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SYSTEM

OF THE

MODERN ROMAN LAW,

TRANSLATED FROM THE GERMAN OF

FRIEDRICH CARL VON SAVIGNY,

78805

BY

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CORRIGENDA.

Page 10, note (*b*), 5th line, *for* "Titrelus" *read* "Titulus."

„ „ note (*b*), last line, *for* "Anatomy" *read* "Autonomy."

„ 41, note (*a*), 4th line from bottom, *for* "Sanctis" *read* "Sanctio."

„ 47, note (*g*), 1st line, *for* "voluntatum" *read* "voluntatem."

„ 55, 7th line from bottom, *for* "or" *read* "in," and *for* "opposuite" *read* "opposite."

„ 59, note (*l*), 6th line, *for* "consequeater" *read* "consequenter."

„ 69, 3rd line from bottom, *for* "claim" *read* "claims."

„ 76, 20th line, *for* "preposition" *read* "proposition."

„ 84, note (*b*), 3rd line, *for* "orst" *read* "orat."

„ 169, 3rd line from bottom, *for* "the part of" *read* "on the part of."

„ 269, 4th line from bottom, *for* "gains" *read* "gain."

„ 276, 6th line from bottom, *for* "being" *read* "a being."

„ 331, 6th line from bottom, *for* "which" *read* "with which."

PREFACE.

WHEN a scientific province, such as ours, has been cultivated by the unbroken exertion of many centuries, a rich inheritance is offered to us who belong to the present. It is not merely the mass of truth won which falls to our share; every direction essayed by the intellectual powers, all efforts of past time, be they fruitful or abortive, are also good for us as pattern or warning and thus we are in some sense in the position of working with the united power of centuries passed away. If now we would, through indolence or conceit, neglect this natural advantage of our position and in a superficial treatment leave to chance how much of that rich inheritance is to influence our culture, we should then be dispensing with the priceless benefits inseparable from the nature of real science—the communion of scientific convictions and at the same time with the constant, living, progress without which that communion might pass over into a dead letter. In order that this may not happen, it is desirable that from time to time, the researches and gains of individuals should be summarized in a unifying consciousness. The holders of science, living at the same time, are often in sharp oppositions to one another; but those contrasts come out still more strongly when we compare all ages. Here our business is not to choose the one and reject the other; the task consists rather in dissolving the perceived oppositions in a higher unity which is the only way to a safe progress in the science. The frame of mind suitable to such compre-

hensive work is a reverence for the GREAT which appears in the efforts of our predecessors. That however this respect may not degenerate into a narrowing one-sidedness and thus endanger the freedom of thought, it is necessary to direct our eyes fixedly to the final aim of the science, in comparison with which even the greatest accomplishable by the individual must appear incomplete.

If however the continuous cultivation of our science throughout many generations offers a rich inheritance, it is also the originator of peculiar and great dangers. In the mass of ideas, rules and technical expressions which we receive from our predecessors, with the truth won, will infallibly be mingled a large addition of error, which, with the traditional power of an ancient state of possession, operates upon us and may easily obtain mastery over us. To prevent this danger we must desire that from time to time the whole mass of that, which has been handed down to us, should be, newly examined, brought into doubt, questioned as to its origin. This will be done by placing ourselves artificially in the position of having to impart the material transmitted, to one unskilled, doubting, controverting. The fitting spirit for such a testing work is one of intellectual freedom, independence of all authority; in order however that this sense of freedom may not degenerate into arrogance, there must step in, the natural fruit of an unprejudiced consideration of the narrowness of our own powers, that wholesome feeling of humility which can alone render that freedom of view fruitful of performances of our own.

From two wholly opposite stand-points, we are thus directed to one and the same need in our science. It

may be described as a periodically recurring examination of the work accomplished by our predecessors, for the purpose of removing the spurious but of appropriating to ourselves the true as a lasting possession, which will place us in the condition, according to the measure of our powers in the solution of the common problem, of coming nearer to the final aim. To institute such an examination for the point of time, in which we actually are, is the object of the present work.

At the very outset however it must not be concealed how greatly the unprejudiced reception of this work may be endangered by what has happened in our science in recent times. Many will be induced by the very name of the author to throw doubt upon the general destination of the work just expressed; they will believe that there is here less regard to the free service of science than to the one-sided representation of the historical school; thus the work will bear the character of a purely party publication against which every one, who does not belong to that school, ought to be on his guard.

All success in our science depends upon the joint working of various intellectual activities. The expression, historical school, was formerly used both by me and others simply to denote one of those activities and the scientific direction especially arising from it. At that time this side of the science was made especially prominent, not for the purpose of denying or even of depreciating other activities and directions, but because that form of activity had, for a long time previously, been more neglected than others and thus, more than others, needed a zealous defence in order that it might again step into its natural rights. Now to that desig-

nation a long continued, lively opposition has attached itself and even very recently hard words have been spoken about it. A defence against such attacks would be unprofitable, in some measure impossible; for as the ill-humour has proceeded more from personal feelings than from scientific oppositions, the opponents of the historical school are accustomed to embrace and censure, under that name, everything in literary manifestations which appears to them inapt and disagreeable; who could attempt a controversy in that state of things? One reproach however, by reason of its more general nature, must be excepted from that forbearance. It has often been asserted by opponents that the members of the historical school, misunderstanding their independence, would subject the present to the government of the past and in particular would improperly extend the dominion of the Roman law in opposition partly to the German law, partly to the new legal culture which, by means of science and practice, has stepped into the place of the pure Roman law. This reproach has a general, scientific, character and ought not to be passed over in silence.

The historical view of legal science is completely mistaken and disfigured when it is frequently so conceived as if the legal culture sprung from the past were set up as a something supreme to which the immutable government of the present and the future must be preserved. The essence of that view rather consists in the uniform recognition of the value and the independence of each age and it merely ascribes the greatest weight to the recognition of the living connexion which knits the present to the past, and without the recognition of which we recognize merely the external appearance, but do not grasp the inner nature, of the

legal condition of the present. The view, in its special application to the Roman law, consists not, as is asserted by many, in assigning to it an improper mastery over us; it will rather first of all search out and establish in the whole mass of our legal condition what in fact is of Roman origin, in order that we may not be unconsciously governed by it: further however, in order that freer space may be gained for the developement and healthy operation of the still living parts of that Roman element, it will, in the circle of those Roman elements of our legal consciousness, separate that part of it which is in fact dead and, merely through our misunderstanding, still drags on a perturbing show of life. The object of the present work is so little that of assigning an immoderate mastery to the Roman law, that on the contrary it contests its applicability to not a few theories of law in which it was heretofore generally admitted even by such as have constantly declared themselves opponents of the historical school. No inconsistency in this procedure can be found in the author since he has been publicly declaring the greater part of these opinions for from thirty to forty years; thus in this appearance there rather consists a proof that the censure mentioned, which people have been in the habit of casting upon the historical school in general and me in particular, is wholly without ground. With the unprejudiced the perception of this fact will rather serve entirely to get rid of the whole party struggle and the party names relating to it, especially since the reasons, which occasioned the first use of the name historical school, have almost disappeared along with the prevailing errors, which at that time required to be combated. A continuous struggle of such a kind may indeed serve for the sharper bringing out of

numerous contrasts, but this advantage will certainly be greatly out-weighed by the prevention of an unprejudiced decision upon that accomplished by others as well as by the dissipation, in the strife of parties, of those powers which might be more advantageously applied to the common ends of the science. I am far from ignoring the general and great advantage of scientific conflict which is even a condition of the life of science; in the kind and direction of the intellectual powers of the individual great variety will be constantly perceived. From the very conjoint operation of elements so opposite, the true life of science is to issue and the possessors of the diverse powers should not cease to regard themselves as labourers at the same great edifice. If on the contrary we allow them to enter hostile camps and strive by the assiduous application of party names to render the opposition positively personal, our perception soon becomes fundamentally untrue and the consequences can be simply mischievous; the individual life and working of others fade from our eyes, in that we approve of, or feel enmity to, them especially as adherents of a party and we thus lose the benefit, which we might naturally derive for our own culture, from the undisturbed operation of their work upon us.

If the attempt, by means of the present work, to procure for the Roman law an immoderate mastery over us, has been definitely disclaimed, so on the other hand it must be no less definitely recognized that the thorough knowledge of that law, even for our present legal condition, is of the highest value, aye call it indispensable; and if this conviction were not here expressed in words, it would be sufficiently manifested by the

fact of my undertaking a work of such compass. It only remains to come to an understanding upon the ground and quality of the great value of the knowledge of that law.

Not a few entertain the following idea upon this matter. In countries in which the Roman law still prevails as law, no real jurist ought to neglect the assiduous study of it; in countries, on the other hand, in which new codes have been introduced such a necessity disappears, and the condition of law itself must be deemed more fortunate, since the jurist may apply his time and power to objects with more life. Were this the correct view, the Roman law would have at best a very precarious value even in those countries, since nothing would be easier than for legislators to bring about the more fortunate condition mentioned, by the appropriation of an already existent foreign code if haply they could not produce a new one of their own. Others have understood the assertion of a special value of the Roman law as if it meant that its material product, as exhibitable in practical rules must be considered of special excellence when compared with similar rules appearing in the legal culture of the middle or modern age. That the present work proceeds upon no apology of this sort, its execution will show. A few isolated cases excepted, the matter lies too deep to admit of being disposed of by such a selection between contrasted practical rules, and a work, which sought to carry out this comparative point of view into particulars, would remind one of the frame of mind of a child who, when the histories of battles are related to him, is always inclined to ask —which were the good and which the bad.

The intellectual activity of individuals may, in reference to law be displayed in two different directions—by the reception and developement of the consciousness of law in general, by means of knowledge, teaching, exposition; or by applying it to the events of actual life. This two-fold element of law, the theoretical and the practical accordingly appertains to the nature of law generally. It is a characteristic however of the course of developement of recent centuries that these two directions, have occupied positions, and been the object of callings, separated from one another, so that, with few exceptions, jurists, through the exclusiveness or preponderance of their calling, belong either to theory or practice alone. As this has not resulted from the human will, so generally there is nothing in it to praise or blame. It is of consequence however seriously to consider what is natural and wholesome in this contrast, how on the other hand it may result in ruinous one-sidedness. It is a condition of all health that, amid these separated activities, each should keep firmly in view the original unity, so that, in some degree, every theorist should preserve and develope the practical, every practitioner the theoretic, feeling. Where this is not the case, where the separation between theory and practice becomes an absolute one, there unavoidably arises the danger of theory being degraded to a mere sport, practice to a mere handicraft.

When I say that every theorist should always bear within him a practical element, I am speaking of feeling and spirit, not of occupation; although in truth some practical employment, rightly applied, is the surest way to the promotion of the practical sense. Certainly many, who have earnestly and vividly

attached themselves to jurisprudence, have experienced that a single case has given them such a lively view of an institution of law as they could never have attained by the study of books and their own meditation. What is thus casually, in single cases, thus adapted to our improvement, is conceivable as the conscious end of our exertion and as carried through the whole of our science. Then he would be the complete theorist, to whose theory life was given by the complete thorough contemplation of the entire practice of law; thereby all moral, religious, political, economical relations must stand before his eyes. It is hardly necessary to mention that this requirement is not set forth for the purpose of blaming those who do not completely fulfil it, for every one, who would apply such a standard to another, must admit how far he himself falls short of it. Nevertheless it is well to keep before one's eyes such an aim for the united efforts of manifold powers—first that we may keep in the right direction and next that we may preserve ourselves from all paroxysms of self-conceit, against which none is wholly safe. If now however we compare the actual condition of our legal theory, with what it was fifty and still more a hundred years ago, we find excellences and defects singularly mixed. No one indeed will misunderstand, that much has become possible and actually accomplished, which earlier was not to be thought of, that the mass of acquirements brought into operation, in comparison with that earlier time, stands very high. If we regard the above demanded practical sense, by which, in the individual theorists, their knowledge is to be vitalized, the comparison must turn out less to the advantage of the present. This fault of the present is however connected with the peculiar direction at present perceptible in

theoretic efforts themselves. Nothing certainly is more commendable than the effort to enrich science by fresh discoveries; however even this effort has in our time taken a frequently one-sided and unhealthy turn. Men have begun to set an inordinate value upon the origination of new views, in comparison with the true, vivid cultivation and satisfactory exposition of those already discovered, although by these, when earnestly conducted, the already existent constantly assumes a new shape and will thus lead to the practical, even if little remarkable, progress of the science. Since now a widely operating creative power has not been given to most, that one-sided prizing of the new, has led many to exercise themselves especially in isolated, fragmentary, thoughts and opinions and to neglect for the sake of this splintering the possession of our science as a coherent whole. In this respect our predecessors, among whom was found a proportionally larger number capable of worthily representing our science as a whole, were superior to us. He, who will regard the matter from a more general stand-point, will be readily convinced that these appearances are in no way peculiar to jurisprudence, but are rather in complete coherence with the course of developement of our literature.

On the other hand it was demanded above that the practitioner should likewise bear in himself a theoretic element. It is not meant by this again that he should be likewise an active author or even be constantly going through a comprehensive study of books; both would be wholly impossible on account of the extent of practical labours. He ought however, in his very practical occupation, to preserve ever living the feeling

for the science, he ought never to forget that jurisprudence rightly conceived is nothing else than the summarizing of that which in individual cases, he is to become conscious of and apply. In estimating a practical jurist nothing is more common than the attaching of exclusive value to mere adroitness and readiness, although these, in themselves very serviceable qualities, are perfectly compatible with the most unconscientious superficiality. That the right spirit does not penetrate our juristic practice becomes quite manifest from the result shown by it as a whole. If this spirit were operative in it, theoretic efforts must be assisted by it and, where they err, be led back to the right road; especially however it must so prepare the way for legislation that both written law and the practice of it must, agreeably to nature, go forward in intimate union. Do we not for the most part find the exact reverse of all this?

If now the main evil of our legal condition consists in an ever-increasing separation between theory and practice, the remedy can be sought only in the restoration of their natural unity. To that very end however, the Roman law, if we will rightly employ it, is capable of rendering the most important service. Among the Roman jurists that natural unity appears still undisturbed and in the liveliest activity; it is no merit of theirs, even as the opposite condition of modern times has been produced more by the general course of developement than by the fault of individuals. To the extent that we with earnestness and candour enter in thought upon a procedure so different from ours, we may also make it our own and thus ourselves get back into the right road.

Since however there are very different ways of seeking the knowledge of the Roman law, it is necessary to express clearly what kind of way to this knowledge is required for the attainment of the end proposed. That a thorough scientific process is meant, every one will readily expect; many however might be deterred by the erroneous idea that the whole work of antiquarian enquiry and critical examination of the sources, is required of every one who would obtain for himself such a knowledge of the Roman law; now although this branch of our study is important, still the wholesome principle of the division of labour is in this matter not to be ignored; thus the majority will be quite contented with the results of the special enquiries conducted by individuals. On the other hand it would be a complete error to believe that the end proposed would be furthered in the smallest degree by a knowledge of the most general principles of the Roman law —such a knowledge for example as is laid down in a compendium of the Institutes or such as it is the custom to impart in the French schools. Such a knowledge is sufficient for fixing in the memory, until a better future, the words of the Roman law; to him, who limits himself to this, it is hardly worth the small effort which he applies to it. If the knowledge of the Roman law is to lead to the end proposed, there is one way only; we must independently read, and meditate for ourselves upon, the writings of the old jurists. Then also we shall have nothing further to fear in the enormous mass of modern literature. Judicious guidance will point out to us the little of it which can be really required for our independent study; the rest of the mass we may abandon to the jurists, whose calling is theory, who cannot indeed decline this laborious occupation.

The entire special design of the present work is to further the stated objects of a serious study of the Roman law—especially therefore to diminish the difficulties which ordinarily hold back the jurists, whose calling is practice, from independently studying the sources for themselves. By reason of these difficulties an inordinate authority is attached to the opinions laid down in the most current modern manuals; therefore if the design of the author is fulfilled in this work, the emancipation of practice from a spurious theory will be worked out in it.

Doubtless these thoughts will be most immediately applicable in those countries in which the Roman law is still the foundation of legal practice; they are however also applicable where new codes have stepped into the place of the Roman law; for in both places the defects of the legal condition are essentially the same and in like manner the need and the kind of the remedy are less different than one might suppose. Even therefore in countries provided with indigenous law books, by the mode of utilizing the Roman law here proposed, theory will in part be furnished with new life, in part protected against aberrations entirely subjective and arbitrary, more especially however it will be again approximated to practice which is the matter of greatest consequence. Such a changing is in truth more difficult here than in the countries of the common law, but impossible it is not. This is markedly shown by the example of the modern French jurists who, often in a very judicious manner, illustrate and complete their Code from the Roman law. In this they obviously proceed according to the true sense of this Code and where they make mistakes, this occurs

less from an improper mode of using the Roman law, than from a defective knowledge of it. In this we are indisputably superior to them, but in the mode of employing it beside the indigenous laws we should do well to learn from them. In truth in our Prussian father-land this employment is more difficult than with them, because in our Code the innate connexion with the earlier law actually existent, is often concealed, partly by the peculiar mode of exposition, partly by the great prolixity displayed. More difficult therefore it is but not therefore impossible; and when it is reinstated, a remedy will be applied to an essential evil which has resulted from the introduction of the Code. This evil consists in the complete separation from the scientific working up of the common law whereby our practice has been hitherto deprived of one of the most important means of culture—the living contact with the juristic thoughts of earlier times and other lands. It is not to be disguised that at the time, at which the composition of the Prussian Code was undertaken, the German juristic literature had become in a great measure spiritless and unserviceable and had consequently lost almost entirely the capacity for a beneficial influence upon practice; indeed the perception of this faulty condition of law, at that time led to the design of remedying the evil by an indigenous code and thus entirely changing the foundation of the practical law. If, in the present entirely altered condition of jurisprudence, we should succeed in partially re-establishing the dissolved connection with the literature of the common law, the result now could be nothing but the arising of a beneficial influence upon practice, and the mischiefs, so sensibly felt at an earlier time, would certainly not recur.

Many perceive, in the effort to employ the Roman law constantly as a means of culture for our own legal condition, simply an injurious depreciation of our time and our nation. They conceive the matter as if, in the most favourable case, we could still only set forth an incomplete imitation of the condition of law brought forth by the Romans, and in their view it is more worthy to create something new by our own independent efforts. A misunderstanding lies at the root of this in itself commendable self-appreciation. By reason of the great and manifold legal material with which centuries have supplied us, our task is incomparably more difficult than that of the Romans; our aim thus stands higher and when it happens to us to reach it, we shall not merely have repeated in mere imitation the excellence of the Roman jurists, but have accomplished something much greater than they did. When we shall have been taught to handle the matter of law presented to us with the same freedom and mastery as astonishes us in the Romans, then we may dispense with them as models and hand them over to the grateful commemoration of history. Until that time however we should be restrained as little by false pride as by love of ease from making use of a means of culture which it would be scarcely possible for us, by our own power, to restore. In this province we have thus asserted a relation of our age to antiquity similar to that which we in like manner perceive in other intellectual departments. May no one understand these words as if they would elevate the pursuit of the Roman law to the detriment of the zealous Germanic efforts which in our own time give room for expectations so joyful. Nothing is more common and more natural than for the lively zeal for the province of our

own researches to display itself by the depreciation of a diverse but cognate province; but an error it is nevertheless, and this error will infallibly be productive of harm, to him who cherishes and practises it, not to him whose injury is intended by such depreciation.

From the plan of this work above laid down, it follows that it will have an especially critical character. Many will be little satisfied with that, since they above all desire to attain merely positive truth susceptible of immediate application, without regard to the mode of obtaining it and the possible contradictions of it. Our intellectual life would be easy and comfortable if we could let merely the clear simple truth operate exclusively upon us and thus ever progress undisturbedly to fresh knowledge; but we are encompassed and hemmed in on all sides, by the rubbish of false or half-true ideas, through which we must make a path for ourselves. Would we struggle with fate because it has imposed so unprofitable a burden upon us? We have only to resign ourselves to it as to a necessary condition of our intellectual existence, but there is no want of rich fruit which, as the reward of our labour, grows out of this necessity. Our intellectual power therein finds its general education and each single truth, won through this conflict with error, becomes in a higher sense our property and shows itself more fruitful for us than if we had, passively and without effort, received it from others.

The critical character of the work mentioned will be shown especially in the following particular applications. First and almost exclusively in the not infrequently wholly negative results of a research undertaken—whether this consists, in an institution of

Roman law being pointed out as dead and consequently foreign to our legal state, or in the exhibition of the groundless ideas and theories erroneously inserted by modern jurists in our system of law. It is precisely such enquiries by which many will perhaps be annoyed and repelled. He however, who removes stones from the way or by sign posts gives warning against deviations, essentially improves the condition of his successors; when the advantages so obtained have become rooted by custom, it may soon be forgotten that there was once a time at which difficulties were here to be overcome.

That critical character of the work will not however be shown in merely negative results but where, for the establishment of a positive truth, the simple, absolute, contrast of the true and false does not suffice. Thus in many cases it becomes on that account especially important to mark out precisely the degree of our conviction. When *e. g.* we enter into conflict with the opinions of others, this may happen in diverse ways. The feeling of complete truth is not seldom attached to our opinion through our perceiving how the opinion of our opponent springs from logical defects, unacquaintance with facts, or a thoroughly censurable method; in such a case we hold this opinion inadmissible on scientific grounds and in our contradiction is involved decided blame of our opponent. It is not so in other cases in which, after careful weighing of all the reasons, we give the preference to one opinion but without there being any claim to so decided a condemnation of our opponent. Now in this probability, with which we must then be satisfied, degrees are distinguishable, and the accurate pointing out, the

conscientious recognition, of these degrees belongs just as much to the moral as to the scientific value of our work.(a) In other cases of conflicting opinions, it is of consequence to determine accurately the proper limits of the conflict, as also the value and influence, which this difference of opinion exercises in the science. The liveliness of the struggle as well as the self-esteem often raised by it readily leads us to attach to it an extravagant importance, and hence occasions our leading others into error in this respect. In the last place in the opinions of others combated by us, a relation of them, which may be designated as relative truth, deserves especial attention. For example we shall not seldom recognize in an opinion, which we must reject as erroneous, a true element which has been converted into error merely by inverted treatment or one-sided exaggeration; this is true of many cases in which the error merely consists in the concrete being conceived too generally or the really general too concretely. The exhibition and recognition of such a true element in the opinion combated by us as erroneous, may be of great value to the science; it is especially fitted to bring about an understanding among unprejudiced, truth-loving opponents and thus to bring the dispute to the purest and most satisfactory determination by the resolution of the oppositions into a higher unity.

The form, in which the ends here proposed are to be pursued, is the systematic and as this is not conceived by all in a like way, it is necessary to give in this

(a) Lebens Nachrichten über B. G. Niebuhr. B. 2. S. 208. "Above all things we must in the science preserve our truthfulness so pure, that we do not write the very smallest thing, of which we are not thoroughly convinced, as true, that, where we are driven to conjecture, we use every effort to render clear the degree of probability." Much in the excellent letter, from which this passage is taken, applies not only to philology, to which it actually relates, but to all sciences.

particular place a general explanation. I place the essence of the systematic method in the knowledge and exhibition of the innate connexion or of the relationship, by which the single ideas and rules of law are attached to a great unity. Such relationships are at first often hidden and the discovery of them will then enrich our research. They are moreover very manifold and our view will become more complete in proportion as we succeed, as to an institution of law, in discovering and pursuing its relationships on various sides. Lastly not seldom we are presented with a deceitful shew of relationship where such does not in fact exist, and then our business consists in the annihilation of this appearance. The external arrangement of a systematic work will naturally be determined by that innate connexion which is to be reflected in it, and one not uncommonly thinks of this alone when one speaks of systematic treatment. As to that a warning is however needed against several misunderstandings. In the richness of living reality, all jural relations form a systematic whole, we are however necessitated to break them up into their single parts in order to receive them successively into our consciousness and to impart them to others. The order, in which we put them, can therefore be determined only by that relationship which we actually recognize as the preponderant one and every other relationship, existing in reality, can only be brought to view beside that in a disjointed mode of statement. In this matter a certain tolerance, more a certain play-room must be demanded for the subjective course of culture of the writer which perhaps determines him to give especial prominence to a certain method of treatment which he will then be in a condition to render especially fruitful.

Many require of a systematic exposition that nothing should be put forward which has not found a systematic grounding in that which has gone before and those reasons must in no way be embraced in the contents of the subsequent parts. To these the present work must be a great offence as I cannot regard that requirement for a work such as this even as an approximation to the rule to be followed. The basis of that requirement is the supposition that the matter is strange to the reader and must now for the first time be made known to him and it is quite correct to require it in the arrangement of preliminary instruction. It will scarcely however enter any one's head to wish to take his first lessons in jurisprudence from so copious a work as the present. It will rather be made use of by those, to whom the matter has become known by means of courses of instruction and other books, for testing, purifying, laying a deeper foundation for, enlarging, the knowledge already acquired. It may well be expected of such that at each point of the exposition, that which they already know will be recalled to their consciousness even when in this work it is first set forth independently at a later time. If one will avoid this procedure, one is under the necessity either of entirely abandoning the exposition of the most important and most fruitful relationships of the institutions of law or of transferring them to a place in which they must become less evident and operative. Hence if in fact by the arrangement selected the advantage of life-like exhibition is attained, that selection needs no other justification. These however who might not be determined by these reasons to give up the censure mentioned should call to mind that in copious monographs they put up with a number of suppositions of which the

grounds are not given in the actual book. Why should the author of a comprehensive work have smaller rights in this matter than the author of a monograph ?

As for the obviating of a supposed reproach, attention has been here called to monographs, which are of the more importance that in them the most important progress of our science in modern times is to be sought, we must obviate at the same time a misunderstanding which is entertained by many as to the relationship of this sort of works to a comprehensive system of law. They think of each monograph as if it were a single section of a system, accidentally worked out and put forth separately from the system as a whole; according to this view all that would be wanted would be a sufficient number of good monographs in order, by their combination, to construct a satisfactory system. The essential difference however consists in the stand-point of an individual institution of law, in a monograph, being arbitrarily selected in order from that stand-point to perceive the relations to the whole; on this account however the selection and arrangement are quite different from that which would be adopted where the self-same institution is to be set forth in a complete system of law. I have found this remark necessary to explain and justify beforehand, the doctrine of possession being about to assume, in the present work, an entirely different shape from that of the book in which I at an earlier time specially expounded it.

Beside the system itself are found in this work distinctive enquiries under the name of appendixes; I have, on various grounds, found this arrangement necessary. At times a particular question needs so extended an examination that its conduct in the course

of the system would far over-step the right measure and so destroy the natural coherence. In other cases a legal concept exerts its influence so equally upon wholly different parts of the system, that only a separate exposition can lead to an exhaustive treatment of the object-matter; this is literally the case of a copious appendix in which the theory of error will be discussed (Beilage VIII.). Lastly it is true that antiquarian researches are entirely without the plan of the work; at times however these are so interwoven with institutions of the most modern law, that these could not be brought completely to view, if their appropriate place in an appendix were not allowed to those. It is impossible to fix a completely safe boundary between the matter which ought to be allotted to the system and that which should be consigned to the appendixes, and it will perhaps be wished by some that here and there something more or less, than is in fact, should be, banished to the appendixes. As to this question also a somewhat wide play-room may without danger be permitted to the individual freedom.

In earlier times it was customary to adopt, in the exposition of the single institutions of law, a wholly uniform method of which it was an especial characteristic that a complete statement of all possible divisions necessarily followed the exposition of the concept. Many more recent authors have rejected this arrangement as unserviceable and useless, and have consequently confined themselves to calling attention to such divisions, where the statement of particular rules of law leads to them. I can approve of neither the one proceeding nor the other as a general maxim, for in this matter I regard as censurable every mechanical uniformity whether it consist in doing or leaving

undone. Each form is good and desirable which, in the application, furthers a thorough insight into a legal institution, and one should hence do, in each particular case, what its special nature requires. Where therefore the concept of a legal institution includes in itself contrasts deeply influencing its very nature, for a complete dealing with that concept it may well be necessary to append to the general statement of it the divisions in which those contrasts find their expression.

In the present work special care will be applied to the accurate settlement of the genuine phraseology of the sources and it is necessary to justify this because many believe that in recent times an excessive importance is ascribed to it. The importance of it however arises from the existence of an unmistakeable and dangerous interchanging between ungenuine phraseology and the erroneous construction or uniting of concepts. For while on the one hand the false use of language is the product and indicator of the erroneous idea, on the other this is established, extended, propagated, by that. When however this source of error has been destroyed by the unmasking of the spurious terminology, we ought not to permit ourselves to be restrained from the use of newly formed technical expressions where the phraseology of the sources is inadequate and in this respect perhaps many have pushed purism too far. It will merely be always advisable to avoid those ungenuine expressions, which have in fact already shown themselves dangerous by their connexion with false ideas.

A special chapter has been given to the explanation of the manner in which the sources have been employed in this work (S. 32—52); however some general

explanations will not be out of place even here. The jurists are often derided for being guilty of great prodigality in seeking to prove by numerous texts what every man would trust them upon without proof. If indeed such citations are regarded as mere forms of defence against doubts and contradictions wholly non-existent, this blame might have some foundation; but as to that there is another and in some measure an opposite view. If the assertion made above, that we may gain from the right treatment of the old jurists a vitalizing and enriching of our own juristic thought obtainable in no other way, is well founded and if this right treatment is not without peculiar difficulties, a systematic introduction to it must be welcome to us. The present work is to serve for such an introduction; from this point of view, the texts quoted from the sources appear not merely as proofs of the propositions laid down in the system but these propositions will be at the same time an introduction to, and commentary upon, the texts cited which, in this selection, arrangement, connexion with the representation embraced in the system, ought to be brought nearer to our mode of thought and be rendered more accessible to us. It is not seldom found that two enquirers equally careful, while working upon exactly the same material, are nevertheless led to very different results. This difference will for the most part be dependent upon, what texts are raised to the central point of the whole enquiry, which brought into subordinate connexion with them; a misconception in this separation may give a false direction to the whole work. In this matter little security is to be gained by the laying down of rules; the study of excellent models will do good service, but above all we must seek to gain by

our own practice the tact which teaches us to find the right way.

It is probable on the other hand that many will be disappointed in the demand, which they may be inclined to make, of a greater wealth of literary material than they will find in the present work. I have designedly referred merely to such jurists as with reference to the plan of this work are likely to be serviceable, if only in consequence of their referring to other writers for wider investigation; therefore I have not at all striven after a material completeness in the statement of all writers who treat of an object-matter even when they are of no considerable use, if I had I should deserve small thanks from the reader for leading him, by referring to such writers, to waste his time upon a fruitless acquaintance with them. Had I come to this undertaking in my earlier years I would have attempted an exhaustive employment of the juristic literature in a wholly different sense. We find in it two great masses difficult of mastery, a mass however from which of course much benefit is nevertheless extractible; the one consists of exegesis beginning from the glossators and then especially continued throughout the French school: the other in practical matter, the authors of numerous *consilia responsa*, &c. likewise reckoning from the glossators. An exhaustive employment of them, according to my meaning, would consist in reading through these jurists with special reference to this system that is in order to test, rectify, complete, the system, a procedure by which doubtless very much might be gained in particulars, less in the mass and the whole. Now beginning as I do this work in the evening of my life, it were folly to think of such a plan. Any one however, who ascribes to the work an

enduring value, might be of essential service to it, if he were willing to undertake to give it the literary completeness here pointed out. There is nothing extravagant in this proposal inasmuch as it might be carried out gradually and in separate pieces, perhaps by reading through the jurists or even individual works of a limited space of time. Perhaps also people will regret that I have not given, at the outset of the work, a collection of the authors useful and to be recommended for the study of our system of law. It appears to me however more suitable for this certainly important want to be satisfied by writers expressly upon bibliography, just as the historical summarizing of our separate law-sources, their manuscripts, and editions, is better undertaken in works on legal history than at the outset of a system of law, where a satisfactory exposition of this sort is without foundation and coherence.

The material for the present work has been gradually collected and worked up in the courses of instruction which the author has been giving from the very commencement of the century. In the shape in which it now appears, it is however an entirely new work for which those lectures could be used merely as a preparation. Further, lectures are meant for the uninitiated; they are designed to bring new and strange object-matters to the consciousness of the hearers, by adapting the exposition to their other acquirements and their general culture. The writer on the other hand works for the initiated; he pre-supposes their possession of the science in its present shape, he attaches his communication to this possession and summons them, in common with himself, to meditate anew upon what they know, in order that they may purify, secure,

enlarge, their possession. Undeniable as is this contrast of the two forms of instruction, the passing over of one into the other is not only conceivable but unobjectionable. The jurist also may sometimes so handle the material as imperceptibly, in common with the reader, to go back to the beginnings of scientific ideas and permit them, as it were, to arise anew before his eyes. Frequently such a proceeding may do good service in the cleansing of the ideas and propositions after they have been arbitrarily treated and disfigured by others; the author will have especial inclination and readiness for that work if he has frequently had occasion to handle, in his courses of instruction, the matter which he is now employing as writer. The plan of the work in its existing shape was sketched in the spring of 1835; in the autumn of the same year, the working out of it had been begun and when I began to print, the four chapters of the first book and the first three chapters of the second had been completed.

At the moment of sending forth this work, I cannot suppress thought upon the fate which awaits it. Good and bad will be its portion as of every effort and work of man. Many will tell me how faulty it is; none however can see more completely or feel more vividly those faults than I do. Now that a considerable portion lies ready before me, I could wish that so much had turned out more exhaustive, clearer, otherwise. Should such knowledge deprive us of the courage required to resolve upon every extensive enterprise? Amid that self-knowledge there is comfort in the consideration that truth is advanced not merely by the absolute knowledge and expression of it, but by pointing and smoothing the way to it, and by firmly positing

the questions and problems, on the solution of which all success depends; when this is done we aid others in attaining the end which it is perchance not given to ourselves to reach. So now I am comforted by the self-confidence that the present work may contain fruitful germs of the truth which, peradventure will first come to their full bloom in others, and turn out ripe fruit. It will be a small matter if in that new, richer, unfolding, the present work, which afforded it the germ, steps into the back-ground and is even forgotten. The individual work is as transitory as the individual man in his visible appearance, but imperishable is the thought which, stepping forth beyond the lives of individuals, unites us all who labour with earnestness and life, in a large, lasting, communion, wherein each, the very smallest, contribution of the individual, finds its enduring life.

Written in *September* 1839.

FIRST BOOK.

SOURCES OF THE MODERN ROMAN LAW.

CHAPTER I.

OBJECT OF THIS WORK.

SECTION I.

MODERN ROMAN LAW.

THE part of the science of law, of which the exposition is undertaken in this work, has been designated as the Modern Roman Law. This special undertaking will now, in the following contrasted propositions, be more precisely defined than it could be in a mere title.

1. It is the Roman Law which is to be exhibited in this work. To the actual undertaking belong merely those legal institutions which have a Roman origin, with the inclusion however of their later developement, although this should be referable to another, than Roman origin. Hence are excluded all institutions to which a Germanic origin must be ascribed.

2. It is the existing Roman Law. Hence are excluded; first, the history as such of legal institutions; secondly, each special determination belonging to the earlier law which is strange to that of Justinian, because this newest form of the Roman Law alone has entered into connexion with our modern state of law; thirdly, each institution which belonging to the law of Justinian, has disappeared from our state of law.

3. Private law and not public law belongs to our undertaking: consequently that part of law which the Romans denote by *jus civile* in one of the many acceptations of that term; in other words that which in the time of the republic, they regarded as the exclusive science of a *juris-consultus* or jurisprudence proper.(a) This limitation is in part to be regarded as a consequence of the preceding, inasmuch as the private law of the Romans only, has become in any considerable quantity, a part of our present law.

True, it is that the Roman Criminal Law also has not remained strange to our present law, but it has entered into it partially and incomparably less than the private law.

4. Lastly merely the actual system of law to the exclusion of procedure or the forms destined to the pursuit of rights: consequently merely that which is called by many material private law. For procedure has formed itself in so peculiar a manner by the blending of sources historically diverse that a special treatment of this branch has become necessary, instead of holding as the Roman Jurists would have held, the intimate union of the theory of procedure with that of material law not only as possible but expedient. With respect to the limit of our work on this side, there is in point of principle no doubt, but in practice that limit is

(a) Although Cicero carefully distinguishes between himself and the jurists he was far from believing, that he or any other statesman, must know less than a Jurist of the constitution, *jus sacrum*, &c. Ulpian to be sure gives to jurisprudentia a much wider scope (L. 10, T. 2, D. de J. et J.); this does not arise merely from the indefiniteness of his explanation and still less from an undue exaltation of his science, but from the entirely altered position in his time of statesmen and jurists.

often misunderstood, principally because one and the same institution may in fact belong to two departments. For example the judicial decision, as to its form and its conditions belongs to procedure; on the other hand, as soon as it becomes legally valid, it has two operations: one, the action and exception arising from a *res judicata*, which belong to the system of law itself; the other, execution which is a pure doctrine of procedure.

If these limitations are brought to a common point of view, they precisely define the Roman Law in the sense in which, it has become common law for the greater part of Europe.

SECTION II.

COMMON LAW IN GERMANY.

To the conception of common law laid down in the first section, the conception of the common law prevailing in Germany is nearly allied. That law is bound up with the peculiar constitution of the German Empire of which the single states were united under the general authority of the empire. Thus every part of Germany was subject to a double authority under the influence of which a two-fold positive law was formed—territorial law and common law. Now many writers assert that upon the dissolution of the German Empire, the common law has lost its validity with its basis, the imperial power. This opinion based upon a misunderstanding of the nature of positive law, has remained however entirely without influence upon the actual state of law.(a)

(a) This opinion arises from the erroneous view that with the dissolution of an empire, everything must cease which was created by it or

Now the common law here mentioned is no other than the modern Roman Law in its special application to the German Empire and with the special modifications established by that empire. These modifications however are nearly all contained in the imperial legislation and are of trifling importance; for all the important deviations from pure Roman Law, as for example, the actionability of all contracts without the stipulation, the more extended importance of *bona fides*, have never been peculiar to the German Empire, but have everywhere been uniformly recognized to the exact extent to which the Roman Law has been applied in modern Europe.

Hence an exposition of the modern Roman Law, to which this work is confined, would require merely trifling additions to be able to pass at the same time for an exposition of the common law of Germany.

SECTION III.

LIMITS OF THE TASK.

By the limits established for our subject, every province lying outside them is treated as foreign to it. In reference to this the exposition has to avoid two opposite faults. The one consists in an arbitrary transgression of the limits from a predilection sometimes for a department lying near, sometimes for a special research actually belonging to the subject; the other consists in a narrow observance of the limits even

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under its influence. An entirely similar case is found in the destruction of the Western Empire. In this case also many assert that the Roman Law, must by the conquest have disappeared and did practically vanish. This assertion at least, would not now easily find any more partisans,

where a transgression of them is unavoidable if either the thoroughness of the particular enquiry or the clearness of the exposition is not to suffer.(a) This last consideration makes also a certain toleration on the part of the reader desirable, for here the exact measure is reached more by tact than by fixed rules; a certain free-play cannot therefore be refused to the subjective insight.

Especially much will be admitted which belongs to the common fundamental doctrine of every system of positive law and consequently is clearly not peculiar to the Roman law. In favor of this introduction, speaks not merely former practice especially in the courses of the Pandects of the German universities, not merely the peculiar shape which the Roman law has given to many a part of this doctrine, and the influence which in this direction it has exercised over other systems of legislation: but especially the consideration, that the Roman law, from the exigencies of its situation, has assumed more than any other system of positive law a general character, which renders it especially fit for a satisfactory treatment of that fundamental doctrine.

(a) Thus for example it will be necessary to exhibit the antiquated portions of some laws by reason of the necessary regard to the relation of the sources of law dependent upon these portions.

CHAPTER II.

GENERAL NATURE OF THE LAW-SOURCES.

SECTION IV.

JURAL RELATION. (1)

We have to seek the foundation of the modern Roman law in the Establishment of the law-sources belonging to it. That this may be done with success a more general discussion of the nature of law-sources is altogether necessary.

If we regard the position of Right as in practical life it surrounds and penetrates us on all sides it appears to us as the power justly appertaining to the individual person: a territory in which his will rules and rules with our consent. This power we call a right of this person synonymous with privilege; some call it right in a subjective sense. Such a right appears especially in visible form when on being questioned or resisted, its existence and scope are recognized by a judicial decision.

Only a closer examination convinces us that this logical form of a decision is merely called forth by the accidental need and that it does not exhaust the essence of the matter but itself requires a deeper ground-work. This we find in the jural relation, of

(1.) The description given of jural relation (Rechtsverhältniss) in this and other places will show how inadequate the term is to the denoting of the very complex conception. The literal meaning of the German word is relation of right or law. That word no more than the English by its etymology expresses the conception. It is therefore a technica phrase of this work, and thoroughly explained as it is, will create no difficulty.

which each individual right shows a particular side separated from it by abstraction, so that the very decision upon the individual right can only be correct and convincing in so far as it proceeds from the complete perception of the jural relation. The jural relation has moreover an organic nature and this reveals itself partly in the coherence of its constituent parts, balancing and limiting one another, partly in the gradual unfolding which we recognize in it, partly in the mode of its arising and passing away. This living production of the jural relation in each given case, is the intellectual element of juristic practice and distinguishes its noble calling, from the bare mechanism which so many ignorant persons see in that practice. That this important point may not merely be generally understood but be brought to view in the entire value of its import, it may not be superfluous to illustrate it by an example. The famous law *Frater a fratre* deals with the following case:—Two brothers are under the paternal power. One makes a loan to the other. The borrower repays this loan after the father's death and it is asked whether he can recover this money paid as money paid under mistake. Here the Judge has simply to decide upon the question whether there is or is not ground for the *condictio indebiti*; but to know this, a complete view of the jural relation, must be present to him. The individual elements of this were: the paternal power over the two brothers, a loan of one to the other, a *peculium* which the debtor had received from the father, the inheriting to that father, the discharge of the loan. From these elements, the decision desired from the Judge must proceed.

SECTION V.

INSTITUTION OF LAW.

The decision upon the individual right is only possible by a reference of the particular matters of fact to a general rule by which the particular rights are governed. That rule we call simply law or law in general: some term it law in an objective sense. In its visible shape, it appears especially in legislation which is an expression of the supreme power of the state upon the rule of law.

Even as the decision upon a litigated right, has only a narrowed and dependent nature and first finds its living root and convincing force in the exhibition of the jural relation; so in like manner is it with the rule of law. For the rules of law and also their expression in legislation have a deeper ground-work, in the exhibition of the institutions of law, and the organic nature of this, shows itself as well in the living connexion of the constituent parts as in its gradual unfolding. If we do not stop at the immediate appearance but search into the essence of the thing we recognize the fact that each jural relation is subject to a corresponding legal institution which is, as it were, its type, and by which it is governed, in the same manner as the single judicial decision by the rule of law. Indeed this last is dependent upon the former by which itself is able first to obtain truth and life. The case introduced in the former section shall here also be employed for illustration. The legal institutions thereto relating are: the inheritance by the children to the father; the ancient *peculium* and especially the *deductio* prevailing in it, transmission of credits to the heirs, confusion of

credits and debts, the *condictio indebiti*. In the unfolding of the thought there exists this natural distinction that we first perceive the institutes of law separately and afterwards combine them by an effort of the will and that on the contrary the jural relation is given to us by the events of life and immediately appears in its concrete combination and complexity.

On further examination however we perceive that all the institutions of law are bound up in a system and that they can only be completely conceived in the entire connexion of this system in which again the same organic nature appears. Immeasurable as may be the difference between a single, narrowed jural relation and the system of positive law of a nation, the difference lies merely in the dimensions; in their essence they do not differ and the mental operation which leads to a knowledge of one and the other is essentially the same.

Hence we perceive how vainly as is often done in the science of law, theory and practice are regarded as entirely separated even as opposed. Their outward vocation is different and the application of the knowledge acquired: but the nature and direction of thought as well as the education which leads to them, they have in common and both one and the other of these occupations will only be worthily filled by him, in whom dwells a consciousness of this identity.

SECTION VI.

CONCEPTION OF THE LAW-SOURCES.

We call law-sources the grounds of origin of the general law hence we call so both the institutions of

law, and the individual rules formed from them by abstraction. This conception has a double affinity, hence it becomes necessary to remove two mistakes.

Individual jural relations have their grounds of origin(a) and the affinity of jural relations to the institutions of law easily leads to a confusion of the grounds of origin of jural relations with those of the rules of law. If for example one wishes to enumerate completely the conditions of any single jural relation undoubtedly thereto belongs as well the existence of a rule of law as a matter of fact corresponding to this rule, as for example a law which recognizes a contract, and a concluded contract itself. Nevertheless these conditions are specifically different and it leads to a confusion of that conception if we place on the same line as law-sources, contract and law.(b)

Another confusion based more upon the name, is that of the law-sources with the historical sources of jurisprudence. To these belong all monuments from which we derive a knowledge of jurisprudential matters of fact. The two conceptions are entirely independent of one another and it is merely accidentally when they meet at any single point, nevertheless this meeting is especially frequent and important. Thus for example

(a) The general theory of these grounds of origin is contained in the third chapter of the second book.

(b) That combination, not to speak of the moderns is found in several passages of Cicero (S. 22, note *m.*) As here contracts are wrongly elevated into sources, so on the other hand by an opposite error, laws are dragged down to the same line with the grounds of origin of jural relations in order to save the false theory of Titrelus and *modus acquirendi* (Höpfner Commentar, S. 293.) The ambiguous expression anatomy has often contributed to the former error.

Justinian's compilations belong to the sources in both meanings of the term: the *lex Voconia* belongs to the sources of the older law, but since it is lost, not to the sources of the science of law (jurisprudence.) The opposite case presents itself as to the passages of the ancient historians or poets which contain notices of law. It is however to be remarked that in most cases, in which we have occasion to speak of law-sources, both senses of the expression in fact coincide so that the danger of an error in the conception, is not great. Thus for example; the parts of the *corpus juris*, are as laws of Justinian, law-sources for Justinian's empire, by virtue of their reception law-sources for us, lastly as still existing books, sources of our legal science. In like manner, the German law books of the thirteenth and fourteenth centuries are records of customary laws therefore of law-sources and as preserved books, sources of legal science, (jurisprudence.) Hence also most writers use the expression without giving to their readers special information of these different imports, and they are not, on that account to be blamed.

SECTION VII.

GENERAL ORIGIN OF LAW.

What then are the grounds of origin of common law or in what do the law-sources consist?

If one wished to conjecture on the matter, law may have a wholly different origin according as it is influenced by accident or the human will, reflection and wisdom. But this opinion is contradicted by the undoubted fact that wherever a jural relation comes into question and consciousness, a rule for it is already

present, therefore the discovery of one is neither necessary nor possible. In reference to this property of common law, by which in every given case, in which it is sought for, it proves itself to have a practical existence, we call it positive law.

If we further ask about the subject in which and for which positive law subsists, we find the people to be that subject. In the general consciousness of a people lives positive law and hence we have to call it peoples' law. It is by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth; in that case the will of individuals might perhaps have selected the same law, perhaps however and more probably very varied laws. Rather is it the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same. Since therefore we acknowledge an invisible origin of positive law we must as to that origin, renounce documentary proof: but this defect is common to our and every other view of that origin, since we discover in all peoples who have ever presented themselves within the limits of authentic history an already existing positive law of which the original generation must lie beyond those limits. There are not wanting proofs of another sort and suitable to the special nature of the object-matter. Such a proof lies in the universal, uniform recognition of positive law and in the feeling of inner necessity with which its conception is accompanied. This feeling expresses itself most definitely in the primeval assertion of the divine origin of law or statutes; a more manifest opposition to

the idea of its arising from accident or the human will is not to be conceived. A second proof lies in the analogy of other peculiarities of peoples which have in like manner an origin invisible and reaching beyond authentic history, for example, social life and above all speech. In this is found the same independence of accident and free individual choice, the same generation from the activity of the spirit of the people working in common in each individual; in speech too from its sensible nature, all this is more evident and recognizable than in law. Indeed the individual nature of a particular people is determined and recognized solely by those common directions and activities of which speech as the most evident obtains the first place.

The form however in which law lives in the common consciousness of a people is not that of abstract rules but as the living intuition of the institutions of law in their organic connexion, so that whenever the necessity arises for the rule to be conceived in its logical form, this must be first formed by a scientific procedure from that total intuition. That form reveals itself in the symbolical acts which display in visible shape the essence of the jural relation and in which the primitive laws express themselves more intelligibly and thoroughly than in written laws.

In this view of the origin of positive law, we have at present kept out of sight the progress of the life of a people in time. If we now look also at this operation upon law we must above all ascribe to it an establishing force. The longer the convictions of law live in a people, the more deeply they become rooted in it. Moreover law will develope itself by use and what originally was present as a mere germ will by practice

assume a definite shape to the consciousness. However in this way the changing of law is also generated. For as in the life of single men, no glimpse of complete passiveness can be perceived, but a continual organic developement, so is it with the life of peoples and with each single element of which that concrete life is composed. Thus we find in speech a constant gradual shaping and developement and in like manner in law. This gradual formation is subject to the same law of generation from inner power and necessity, independent of accident and individual will, as its original arising was. But the people experiences in this natural process of developement, not merely a change in general, but it experiences it in a settled, regular series of events and of these each has its peculiar relation to the expression of the spirit of the people in which the law is generated. This appears in the clearest and strongest manner in the youth of a people for then the connexion is more intimate, the consciousness of it is more generally diffused and is less obscured by the variety of individual cultivation. Moreover in the same degree in which the cultivation of individuals becomes heterogeneous and predominant and in which a sharper division of employments, of acquirements, and of ranks produced by these, enters, the generation of law which rests upon the common consciousness becomes more difficult; and this mode of generation would disappear altogether if new organs for that purpose were not formed by the influence of these self-same new circumstances; these organs are legislation and the science of law of which the nature will be immediately explained.

This new developement of law may have an entirely different relation to the originally existing law. New

institutions of law may be generated by it, the existing law transformed or it may be entirely swept away if it has become foreign to the thought and need of the age.

SECTION VIII.

PEOPLE.

The generation of law has been preliminarily posited in the people as the active, personal subject. The nature of this subject shall now be more accurately defined. If in the examination of the jural relation, we remove by abstraction, all its special contents, there remains over as a common nature, the united life of a plurality of men, regulated in a defined manner. We might naturally be led to stop short at this abstract conception of a plurality and regard law as its discovery, without which the external freedom of no individual could subsist, but such an accidental meeting of an undefined multitude is a conception both arbitrary and entirely wanting in truth: and even if they found themselves so met together, the capacity for producing law would be entirely wanting since with a need the power of at once supplying it, is not given. In fact we find so far as history informs us upon the matter, that wherever men live together, they stand in an intellectual communion which reveals as well as establishes and developes itself by the use of speech. In this natural whole is the seat of the generation of law and in the common intelligence of the nation penetrating individuals, is found the power of satisfying the necessity above recognized.

The boundaries however of individual nations are certainly undefined and wavering and this state of doubt also shows itself in the unity or variety of the

law engendered in them. Thus as to kindred races it may appear uncertain whether they are to be regarded as one people or as several: in like manner we also frequently find in their law not an entire consonance, probably however affinity.

Even where the unity of a people is undoubted, within its limits are often found inner circles which are included in a special connexion side by side with the general union of the people, as cities and villages guilds and corporations of every sort which altogether form popular divisions of the whole. In these circles again a special generation of law may have its seat as particular law, side by side with the general law of the nation which by that particular law is on many sides completed or altered.(a)

When we regard the people as a natural unity and merely as the subject of positive law, we ought not to think only of the individuals comprised in that people at any particular time; that unity rather runs through generations constantly replacing one another, and thus it unites the present with the past and the future. This constant preservation of law is effected by tradition and this is conditioned by, and based upon, the not sudden but ever gradual change of generations. The independence of the life of individuals, here asserted of law, appertains first to the unchanged continuation of the rules of law: it is secondly too the foundation of the gradual formation of law (S. 7) and in this connexion we must ascribe to it a special importance.

This view in which the individual people is regarded as the generator and subject of positive or practical law

(a) Thus arose in Rome, the ancient customary law of individual gentes. Dirksen civil abhandlungen, B. II. p. 90.

may appear too confined to some who might be inclined to ascribe that generation rather to the general spirit of humanity than to that of a particular people. On closer examination these two views do not appear conflicting. What works in an individual people is merely the general human spirit which reveals itself in that people in a particular manner. The generation of law is a fact and one common to the whole. This is conceivable only of those, between whom a communion of thought and action is not only possible but actual. Since then such a communion, exists only within the limits of an individual people so here also can practical law alone be created, although in its production, the expression of a generative principle common to men in general, is perceived, consequently not at all the peculiar arbitrary will of several individual peoples of which perhaps no single trace would be found in other peoples. Therein is found merely the distinction that this product of the people's mind is sometimes entirely peculiar to that single people, sometimes equally present in more peoples. How the Romans have conceived this common basis of peoples' law as *jus gentium* will be shown below.

SECTION IX.

STATE, STATE'S-LAW, PRIVATE LAW, PUBLIC LAW.

The people to which we must, as to an invisible natural whole, ascribe undefined limits, nevertheless does not anywhere or at any time exist in this abstract manner. There rather works in that people an irrepressible inclination to manifest the invisible unity in a visible and organic form. This bodily shape of the

intellectual communion of a people is the state and by it are likewise supplied definite boundaries of the unity.

If we enquire as to the origin of the state, we must posit that origin in a higher necessity, in a formative power proceeding from within, as has been above generally asserted of law; and this holds good not only of the existence of a state generally but also of the particular shape presented by the state in each people. Thus also the creation of the state is a species of the generation of law and it is certainly the highest degree of that generation.

If we now contemplate from the stand-point obtained, law as an aggregate, we discern in it, two provinces states-law and private law. The first has for its object-matter the state, that is the organic manifestation of the people; the second the totality of jural relations which surround the individual man in order that in them, he may lead his inner life and fashion it in a defined shape.(a) When we compare these two departments of law, there are not wanting transitions and affinities. For the family has in its enduring membership as also in the relation of government and obedience an unmistakeable analogy to the state: and in like manner communities which are real parts of the state, almost step into the situation of individuals. Nevertheless between the two departments this firmly established difference remains; in public law the whole appears as the end, the individual as subordinate, while in private law on the contrary, the individual man is

(a) L. 1, de J. and J. (I.) Publicum jus est quod ad statum rei Romanæ spectat; privatum quod ad singulorum utilitatem. Sunt enim quædam publice utilia quædam privatim. See L. 2, S. 46, de orig jur. (1, 2.)

on his own account an end, and each jural relation has reference only to his existence or his special circumstances.

Nevertheless the state has likewise a very manifold influence upon private law and first of all upon the reality of its existence. Then in the state, the people first obtains real personality and of consequence the capacity of acting. As therefore to private law apart from the state, we are able to ascribe merely an invisible existence in the concordant feelings thoughts and manners, so that law by the establishment of judicature preserves in the state its life and activity. This however does not imply that in fact, there ever appeared, in the life of peoples before the discovery of the state, a time in which private law could have this incomplete nature (state of nature.) A people rather, as soon as it appears as such, also comes to view as a state, whatever the shape which it may have taken. This assertion therefore will hold good only of that state of a people, which remains to us in thought, when we artificially abstract it from its character as state. In this likewise the relation of individuals to the general law preserves its reality and completeness. Law has its being in the common intellect of the people, (S. 7 and 8,) therefore in their united will which thus restricted is also the will of each individual; but the individual can by force of his freedom, in consequence of what he individually wills resist that which he thinks and wills as a member of the whole body. This contradiction is wrong or the violation of law, which must be annihilated if law is to subsist and rule. If this annihilation is to be independent of accident and maintain a regular certainty, this is only possible in the state; for in the state alone the rule of

law can stand as an external and objective matter, face to face with the individual, and in this new connexion the individual capacity of freedom of wrong, appears restrained by the aggregation of wills and absorbed in them.

The state moreover has also the most evident influence upon the generation of private law and this not merely upon its contents which will yet be spoken of more at length but also upon the limits of the generation, from the consideration that the common spirit of a people must be more intimate and more active within the limits of the same state; in different states even of kindred races on the other hand it must be more remote and be hindered in many ways. Though the arising of a special people's-law is not excluded by the unity of the state, it is there subject to this restriction, that by it the essential unity of the state must not be endangered. It would be simply erroneous in this view of the influence of the state either to fix it too high in comparison with that of other relations or to conceive it as the exclusive motive influence. Thus at the fall of the western empire, several German states consisted partly of German and partly of Roman subjects; in this condition the Roman subjects of the one state had the same Roman law as those of the other; the German subjects of the different states had at a least a kindred law and this more or less complete complete legal communion was not destroyed by the limits of the states.

In order to protect from the reproach of incompleteness the classification of the laws prevailing in a state, here established, the following addition is however necessary. I do not desire to narrow the state to the purposes of law; indeed the theory will not presume

to desire to limit the freedom of individual developement by the assertion of exclusive aims for the activity of the state. Nevertheless its first and most inevitable task is to make the idea of law dominant in the visible world. To this object leads a double activity of the state. First it has to protect the individual who is injured in his right against that injury; we call the rules to which this activity is subject, civil process. Secondly it has to defend and re-establish the injured right, without reference to the individual interest. This is done by punishment, through which the human will, in the narrower field of law, imitates the law of moral retribution prevailing in the higher system of the world.(a) We call the rules to which this activity is subject, criminal law of which criminal procedure forms merely a part.(b) Civil procedure, criminal law and criminal procedure are hence parts of state's-law and were so regarded by the Romans. The strangeness of this conception in more recent times arises from the following circumstances. The administration of criminal law is often lodged in the same jurisdiction as the protection of private right and hence the treatment of the two matters has assumed a like shape. In civil procedure moreover the activity of the state, is so inter-

(a) Thus far one may say that the general moral ordinance of retribution in a limited way, assumes the nature of an institution of law and as such ought to be brought into practice by the state. See Hegel Naturrecht, p. 102, 103, 120. Klenze Lehrbuch des Strafrechts, p. 10-17.

(b) It depends upon the positive law of each state, how far the state will directly exercise this law or leave to the injured individual the pursuit of his own right. This last arrangement is the basis of the private penal law of the Romans. A more complete developement of the power of the state will lead to the abandonment therein of this latter course.

woven with the rights of the individual, that a complete separation is not practically attainable. However the inner nature of these doctrines of law here expressed cannot on that account be changed. In order to afford recognition on the one hand to the essence of the thing and on the other to its more practical bearings it seems desirable to employ, as is not uncommon, with the name state's-law the more general name of public law under which are embraced civil procedure and criminal law. This expression shall henceforth be employed.

The case is quite different with church-law. From a merely worldly point of view, the church seems like every other association, and one might ascribe to it such a dependent and subordinate position as other corporations obtain partly in public and partly in private law. Its importance dominating the innermost nature of men, does not admit of this treatment. In the various ages of the world's history the church and church-law have occupied a very different position towards the state. Among the Romans the *jus sacrum* was a part of public law and was subordinated to the power of the state.(a) The world-embracing nature of Christianity excludes this purely national treatment. In the middle ages the church sought to subordinate the state to itself and to rule over it. We should regard the various Christian churches as existing beside the state, though in manifold and intimate contact with it. Hence Church-law is to us a self-subsisting province of law which must be subordinated neither to public nor to private law.

(a) L. 1, S. 2, de just et jur (1. 1.)

SECTION X.

DISCORDANT OPINIONS CONCERNING THE STATE.

The view here set forth has been far from finding a general recognition.

In the first place here also it is the indefinite concept of a multitude in general, abstracted from the unity of the people, which has often been thought as the subject of the state. This assertion is contradicted by the fact that those who have made their appearance in the organic form of states, were peoples and that wherever an attempt has been made on an extensive scale, without regard to the complete difference of their origin, arbitrarily to bring together masses of men, as in the American slave states, the attempt has been very unsuccessful and insurmountable obstacles have stood in the way of the formation of a state. In contradiction of this opinion, we must again assert that the state arises spontaneously and naturally, in a people, through the people, and for the people.

Moreover there is a widely prevalent opinion in accordance with which states must have taken their rise in the will of individuals, therefore in contract; this opinion has in its developement led to results as pernicious as they are false. There is the assumption that the people who found it advantageous to found this particular state, could just as well have remained entirely without a state, or have united and confined themselves to a state as they actually did so, or in a different manner or that they might have selected a different constitution. In this theory therefore not merely is the natural unity preserved in the people, as well as the inner necessity once more overlooked but especially also the circumstance that wherever such

deliberation is possible, there will infallibly be a state existent as fact and law, so that there can no longer be any question, as these people would have it, of the arbitrary invention of a state but at the utmost a question of destroying it. Two misconceptions have especially contributed to this error. First the perception of the great variety in the formation of states, that is of the historical and individual elements of states which has been confounded with the free choice and arbitrary will of individuals; Secondly the constant and often unconscious interchanging of the wholly different concepts which are denoted by the common name—people. This name denotes, viz.:

1. The natural whole in which the state actually arises and continually carries on its existence and about which there can be no question of choice or arbitrary will.

2. The aggregate of all the individuals living in a state at the same time.

3. The very same individuals with the deduction of the governing body, therefore those who obey in contradistinction to those who govern.

4. In a republican state such as Rome, that organised aggregation of individuals, in which by the constitution, the supreme power actually resides. Those now with whom these concepts, have in a confused manner, run into one another, would be thereby led to transfer the ideal right of the people as a natural whole (1) and the historical right of the Roman people (4) to the whole body of subjects and thus by an entire subversion of the truth, ascribe government to those rightfully obeying. Even when they do not take this extreme step but allow right and power to reside in the aggre-

gate of all the individuals living at the time, therefore with the inclusion of the rulers; they do not better the matter much by that. In the first place because individuals as such and according to the number of heads do not make the state; but merely do so as its constitutionally created members: then because individuals never can will and act in their totality but always in a selected number, so that in regard to a majority, (women and minors) it only remains to have recourse to the empty fiction of a representation: lastly because the very totality of individuals would merely be those existing at the present moment, while the ideal people here spoken of, includes the entire future in itself, and has therefore a permanent existence (S. 8.)

However an element of truth is contained in the views here controverted. Certainly accident and arbitrary will may exercise great influence upon the formation of a state and in particular the boundaries of it are settled by conquest and dismemberment in a manner very different from that dictated by the natural unity of the people. On the other hand a foreign element may often be completely assimilated to the state; the possibility of such assimilation has its conditions and stages as these are furnished by some affinity of the new element and also by the innate perfection of the receiving state. But all such events, however often they may appear in history, are merely anomalies. The people does not on their account the less remain the natural basis of the state and the forming by indwelling power its natural cause of origin. If now into this formative process, a heterogeneous, historical motive principle enters, it may be subdued and assimilated. If this consumption of it, does not take place, a condition

of weakness is thereby presented. In this way is explained how and what was originally force and wrong can gradually be so changed by the power of attraction indwelling in the legal condition, that it passes into it as a new, legitimate element. It is altogether objectionable even rash to try to represent these anomalies which disturb and put to the test the moral force as the real ground of origin of the state and to seek in this view, the only possible protection against the dangerous theory which makes a state arise from the voluntary contract of its individual members.(a) As to this attempt at preservation, it is difficult to say which is more hazardous the disease or the remedy.

SECTION XI.

INTERNATIONAL LAW.

If we go on to contemplate the relation of several peoples and states subsisting near one another, that relation will appear to us at first similar to the relation of single men who are brought together by accident without being bound together by community of race. If each of them, is an intelligent and educated man, they will apply, in their accidental proximity the consciousness of law, inherent in each, from his earlier relations, and they will thus establish themselves in a legal condition which will infallibly be more or less an imitated and consequently a translated one. In like manner several independent states may voluntarily apply that which in each resides as law so far as it is suitable and as they find it convenient; but still no law arises in this way. Nevertheless among different

(a) Haller restauration der Staatswissenschaft.

peoples a community of legal consciousness may arise like that which generates positive law in a people. The basis of this intellectual communion consists partly of a community of race, partly and principally in common religious convictions. Thereon grounds itself the international law which exists especially among the Christian states of Europe and was not unknown to the ancient nations as for example it appears among the Romans as *jus feciale*. And we ought to regard it as positive law although on two grounds as incompletely formed; First by reason of its incompleteness in any certain contents and secondly because there is wanting to it that real foundation which is given by the power of the state and especially by the judicial tribunal to the law of the single members of the same state.

Moreover the progressive moral education as based on Christianity leads each people to apply analogically that positive international law to entirely foreign peoples by whom this mode of thinking is not shared and this practice not requited. Such an application however has a purely ethical character and not the nature of a positive law.

SECTION XII.

CUSTOMARY LAW.

G. F. Puchta das Gewohnheitsrecht B. 1. 2. *Erlangen* 1828 *and* 1837.

The origination of law here set forth under the name of peoples' law, which proceeds in an invisible manner and is therefore not referable to an external event and to a defined point of time, has indeed been recognized at all times although this recognition has remained

unfruitful, for the two main reasons that people have assigned to it a too limited office and that they have conceived its nature wrongly. The first can only be explained below in connexion with legislation; the second is associated with the usual name of customary law.

This name may easily mislead us into the following course of thinking. When anything whatever needed to be done in a jural relation, it was originally quite indifferent what was done; accident and arbitrary will anyhow settled the decision. If the same case presented itself a second time, it was more easy to repeat the same decision than to deliberate upon a new one and with each fresh repetition, this procedure of necessity appeared more convenient and more natural. Thus after a while such a rule would become law as had originally no greater claim to prevail than an opposite rule and the cause of origin of this law was custom alone. If one looks at the true bases of positive law, at the actual substance of it, he will see that in that view, cause and effect are exactly reversed. That basis has its existence, its reality in the common consciousness of the people. This existence is an invisible thing; by what means can we recognize it? We do so when it reveals itself in external act when it steps forth in usage, manners, custom; in the uniformity of a continuing and therefore lasting manner of action we recognize the belief of the people as its common root and one diametrically opposite to bare chance. Custom therefore is the badge and not a ground of origin of positive law. However this error which converts custom into a ground of origin has also an ingredient of truth which must now be reduced to its proper dimensions.

Besides those bases universally recognized in the consciousness of a people and undoubted, there are many determinations as to details which have in themselves a less certain existence; they may obtain such an existence, by being through constant practice brought more definitely to the consciousness of the people itself.(a) Such cases will more frequently present themselves in each people in proportion as the power of forming law, belongs to that people in a less conspicuous manner. Moreover in the nature of many determinations there is a relative indifference; in these it is only necessary that some fixed rule should exist and be recognized as existing, whatever that rule may be. To this class belong the numerous cases in which the rule of law merely determines a number and in which within a certain limit, great latitude is left to arbitrary will, as in the periods of prescription; such too are the rules which have for their object merely the external form of a legal matter. In all cases of this sort, we become by our prior thought and will an authority for ourselves in each later application, and thus custom as such may have an influence upon the formation of law. Here operates the law of continuity of human thoughts, acts and circumstances—a law which has extensive influence upon many special institutions of law.(b) This belief in a custom reacting upon law is only degrading

(a) Puchta II, p. 8. 9. "and for the people from whose views of law it proceeds, custom serves as a mirror in which that people recognizes itself.

(b) The same law shows itself in the burden of proof (as a condition of changing an existing situation) in possession, usucapio, the limitation of actions and lastly in the power of presumptions (S. 20) in each place to be sure in a special admixture and shape. This general point of view can only be indicated here, the exhibition of the institutions of law named must precede its full establishment.

to law in so far as this constant activity is regarded as something irreflective and determined by accidental and external impulse; if on the contrary it is regarded as a considered activity proceeding from the energy of the spirit, the dignity of law is not impaired by this origin. Although therefore the name customary law, in the two senses here illustrated, can be in some measure vindicated, a somewhat narrower use of the word is desirable because it brings with it so many inherited misunderstandings, which have always been bound up with it.

In the two relations in which the use of customary law is important, as marks of positive law and as a co-operative ground of origin, there are two classes of acts which show themselves especially fruitful and efficacious —the symbolical forms of legal acts and the decisions of the tribunals formed from the people.(a) The former bring completely to view the meaning of legal institutions; the latter being called forth by the opposition of

(a) If I here ascribe to the nature of popular tribunals a special weight, I do so in contradistinction to the learned tribunals which in our more modern times are composed of permanent colleges (S. 14.) This character shows itself quite unmistakeably in the German sheriff's courts; not less so in the Roman res judicatæ and this not as one might easily be led to believe, because the judges were private persons and therefore in this sense were taken from the people (for the point of law which is everything here, proceeded from the prætor not from the judex) but because the prætor himself being changed yearly and not necessarily belonging to the educated order of jurists, therefore represented the general view of the people. Thus the Romans themselves referred the res judicatæ as law-sources to the prætor, as their author (Auctor ad Herenn II, 13.) All this however is only true of the ordinary judges who were singly or in a small number nominated by the Prætor. In matters before the centumviri on the contrary it was from the deciding judges themselves that the point of law proceeded (because there was no formula prescribed) and thus was formed for that special purpose the querela inofficiosi.

litigated claims, are compelled by their very object to conceive and set forth the jural relation with rigidly defined boundaries.

When lastly it has been here asserted that the appearance of the exercise of peoples' law in particular cases, must be regarded as a means of its recognition and therefore this may be described as a *mediate* knowledge, necessary for those who, as it were, examine this law from the outside without themselves belonging as members to the confederacy, in which the peoples' law has arisen and leads its continuous life. For the members themselves, such a deduction from the experience of particular cases is not necessary since their knowledge is an *immediate* one resting upon intuition.

SECTION XIII.

LEGISLATION.

Even when positive law had obtained the highest certainty and definiteness, error or a perverted will might seek to withdraw themselves from its government. Hence it becomes necessary to give to it an existence externally perceivable, by force of which each individual opinion may be set aside and the actual control of the unrighteous will be facilitated. Positive law thus embodied by speech and furnished with absolute power is called written law (statute) and the laying down of this is one of the noblest rights of the supreme power in the state. Legislation may be operative as well in public as in private law. Here however it will be more nearly examined in its special reference to the latter.

If we enquire first as to the contents of written law, they are already determined by the mode of derivation

of the law-giving power; the already present peoples' law are those contents or what is the same thing, written law is the organ of peoples' law. If one would doubt about that, one must conceive the lawgiver as standing apart from the nation; he however rather stands in its centre, so that he concentrates in himself their spirit, feelings, needs, so that we have to regard him as the true representative of the spirit of the people. It is also entirely erroneous to regard this position of the legislator, as dependent upon the different arrangement of the legislative power in this or that constitution. Whether a prince makes the law or a senate or a larger collection of people perhaps formed by election or perhaps the agreement of several such powers is furnished for legislation, the essential relation of the legislator to the people's law is not at all changed and it is again owing to the error of the conception censured above, if some believe that real peoples' law is only contained in the laws made by selected representatives.

This view of the nature and contents of legislation has not infrequently been misunderstood as if it ascribed to the legislator an office subordinate and not worthy of him and even as if it tacitly declared the whole practice of legislation not only as superfluous but as even mischievous. This misunderstanding will be most decisively removed by showing in what the real influence of legislation upon the formation of law consists and what specific importance must be ascribed to this influence. This important influence shows itself especially in reference to two things—first as an aid to the extension of positive law secondly as a support to its gradual progress.

With reference to the first, what has been already remarked concerning customary law (S. 12) must be borne in mind. Amid all the certainty of the foundations of positive law, special parts in it may remain undetermined and this especially in a people whose disposition and aim have been distinguished more on other sides than that of law-forming. Here come in the numerous regulations in the nature of which a certain latitude of will is permitted as for example all those determinations which involve as a condition a certain space of time. In all such cases an extension of peoples' law is necessary and although this, as is above mentioned, can be imparted by custom, it is effected more speedily, more securely and in a better way by legislation.

The influence of legislation upon the progress of law is more important than upon the original formation of it. If through changed manners, views, needs, a change in the existing law becomes necessary or if in the progress of time entirely new legal institutions are necessary, these new elements may indeed be introduced into the existing law by the same innate invisible power which originally generated the law. It is however precisely here that the influence of legislation may become most obviously beneficial nay indispensable. Since those operative principles only enter gradually, there of necessity arises an interval of uncertain law and this uncertainty is brought to an end by the expression of the law. Further all the institutions of law stand among one another in connexion and reciprocal action, so that by this newly formed legal proposition, without the matter being noticed a contradiction of other legal propositions, themselves

unchanged, may arise. Hence an assimilation becomes necessary which can only be safely effected by reflexion and considerate and therefore personal exertion of power.(a) These principles obtain a very obvious importance in the cases in which the law at present needing change, was established by previous legislation. For since in this law there dwells the constantly visible and resisting power of the written text, the gradually operating, innate formation will often be entirely hindered and often be lowered to an unsatisfactory degree.(b) Lastly into the history of every people, enter stages of developement and conditions which are no longer propitious to the creation of law by the general consciousness of a people (S. 7.) In this case this activity, in all cases indispensable, will in great measure of itself devolve upon legislation. This change has at no time appeared so evidently and so suddenly as under Constantine from whose time the formation of law, was

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(a) Stahl Philosophie des Rechts II, 1, P. 140.

(b) This is the real meaning of the often misused passage of Göthe:

"Laws are a fatal heritage,—
Like a disease an heir-loom dread
"Their curse they trail from age to age,
And furtively abroad they spread,
Reason doth nonsense, good doth evil grow;
That thou'rt grandson is thy woe
But of the law on man impress'd
By nature's hand, there's ne'er a thought.

Swanwick's Faust.

This has frequently been taken as if a general blame of positive law were expressed and a lament that merely natural law did not govern; that the poet has expressly followed in this passage the same connexion of thought, that I have done, I will not assert. It is however the privilege of the seer to produce directly by intuition that which such as we can only produce by the long and troublesome way of deduction.

exclusively undertaken by the very active imperial legislation.

As it follows from this examination that an importance subordinate in comparison with pure (that is not passed over into legislation) peoples' law, must not be ascribed, it is also necessary to forewarn against the opposite error by which people's law will be treated as a necessary supplement to legislation by accident defective but as no longer to be thought of when legislation has come into existence. This view would lead logically to the holding as impossible a change of a written law by fresh people's law (abrogating custom.) If one acknowledges in the two forms of making law a like independent importance, it will appear evident that the natural creative power of people's law cannot be taken away by the circumstance in itself accidental that a later product of it has assumed the form of legislation.

Besides the contents of written laws of which we have hitherto spoken, the form of them is now to be specially adverted to. This is determined as well by its proceeding from the supreme power as by the absolute power with which it is to operate.

No form can be more suitable to this origin and mode of operation than the abstract one of a rule and a command. Every other that could be attached to it, explanation, exposition, exerting an influence upon the conviction, is foreign to the nature of written law and belongs to other spheres of communication.

From this springs an incongruity between the written law and the institutes of law of which the organic nature cannot possibly be expressed in that abstract form. Nevertheless the legislator must have in his eye

a most complete view of the organic institutes of law and he must from this view of the whole, by an artificial process, form the abstract precept of the law; in like manner must he who is to apply the law by an inverse process re-unite the organic contents of which the law represents as it were a segment. That incongruity and the necessity for this artificial process is lessened wherever the written law is filling the office of enlarging and aiding, for these special aims of themselves wear an already abstract nature and consequently can be more easily expressed in the abstract form of the written law.

SECTION XIV.

SCIENTIFIC LAW.

It is a natural consequence of the developement of nations that in progressive cultivation, special activities and acquirements should separate them and thus form separate occupations for the different classes. Thus also law, originally the common property of the collected people, by the more extended relations of active life is developed in so special a manner that it can no longer be mastered by the knowledge uniformly spread among the people. Then is formed a special order of persons skilled in law who an actual part of the people, in this order of thought represent the whole. The law is in the particular consciousness of this order, merely a continuation and special unfolding of the people's law. It leads henceforth a double life; in outline it continues to live in the common consciousness of the people, the more minute cultivation and handling of it, is the special calling of the order of jurists.

The external forms of the activity of this order present a picture of their very gradual developement. This class first appears merely as giving counsel in particular cases sometimes by advice as to the decision of a litigated matter(a) sometimes by instruction as to the correct performance of the solemnities in legal acts. Next to these commonly appear as their first literary performances, formularies, mechanical indications of the correct execution of legal acts. By little and little the activity becomes more intellectual and educates itself into science. Now show themselves, as theoretical forms the expositions of law partly in manifold books and partly in oral teaching, as practical forms the decisions of the courts which differ from those of the old popular tribunals partly by the scientific education of their members and partly by the tradition of permanent colleges.

Hence one may discern in the order of jurists a two-fold action; one material, inasmuch as the law-producing activity of the people, has in great measure found a retreat among them and is continuously exercised by them as representatives of the whole; one formal and purely scientific inasmuch as the law, however it may have arisen is scientifically brought to knowledge and set forth by them. In this latter function the action of the jurists, appears at first sight a dependent one, receiving its materials from without. However by their giving to the materials so presented a scientific form which strives to disclose and perfect the unity dwelling in them, there arises a new organic life which shapes and reacts upon the materials themselves, so

(a) First verbal counsels of the advocati in the presence of the court subsequently written responsa.

that from science as such, a new sort of generation of law incessantly proceeds. How important and beneficial this formal reaction of science upon the law itself may be, is clear at a glance but it is also not without its dangers. Even in early times the Roman jurists sought to lay down for use in many jural relations, general formulas, which became rooted by tradition and obtained great and lasting respect; Gaius in particular has preserved for us many of these; but the jurists themselves(b) and Justinian in their words, remark upon the danger of an indiscriminate submission to those formulas and point out that their purpose is the summarizing of the law and concentrating its contents but that they ought not to be regarded as bases of law.(c)

In later times this reaction of the form, became much more extended, multifarious and powerful, and herein lies the great danger of the composition of a comprehensive code by which the temporary result of the formal conception becomes fixed and is deprived of the purification and improvement which naturally result from a progressive scientific developement.

The special relation of the order of jurists to legislation will be found when examined, to exhibit itself in

(b) L. 202 de R. J. (50. 17.) Omnis definitio in jure civili periculosa est: parum (rarum) est enim ut non subverti possit.

(c) L. 1. de R. J. (50. 17.) Regula est quæ rem quæ est breviter enarrat. Non. (ut) ex regula jus sumatur, sed (ut) ex jure quod est regula fiat .... quæ, simul cum in aliquo vitiata est, perdit officium suum. That means: we must never sacrifice to the love of it (regula) any otherwise independently established concrete determination. Here therefore is the place for the recognition of exceptions by the side of the rule; indeed what we here call exceptions, is really only the recognition of an incomplete expression of the rule. Legislative declarations expressed in the form of general rules, have a different nature and in these, we must be more sparing in the permission of exceptions.

the following modes. They operated upon legislation partly through the peoples' law improved by them as well as through the spontaneous growth of it being materials for legislation and partly through the juristical training of the persons who in various degrees have an influence upon legislation. They moreover work upon legislation and are the medium of its passage into practical life. The free and manifold forms too of which they may avail themselves, render it possible for them to exhibit the abstract statutory rule in its living connexion with the institutions of law; it is true that the written law also has been derived from a view of that connexion which is not however in itself immediately visible (S. 13.) Thus by scientific handling the government of the relations of life, is rendered easier, and is secured to legislation.

There thus appears therefore, a manifold influence of the order of jurists upon positive law. Against the assertion of this influence, the reproach of unauthorized pretension has often been raised. That reproach could only be well founded if the jurists wished to form an exclusive order but since every one may become a jurist who applies to it the necessary energy, the assertion amounts to the simple proposition that he who makes law the business of his life, will through his larger acquaintance with the matter have greater influence than another upon it.

I call this particular sort of origination of law, scientific law; it is otherwise called jurists' law.

The intellectual culture which has been asserted as the condition of scientific law, must not be misunderstood to be merely a very high order of such culture, since often a bare commencement is sufficient for that

end, so that a very rigorous limitation will not be expected. Still more important is the observation that a similar though more contracted relation may arise from the constitution of the state, if it puts a single order above all other orders in the situation of possessing a knowledge of law.

Thus in Rome a *prudentium auctoritas* was acknowledged in a time, in which there existed not the smallest trace of a scientific need and that *auctoritas* was connected with the exclusive acquirements of the pontifices and consequently with the privileges of the patrician order.(a)

SECTION XV.

THE LAW-SOURCES IN THEIR CONNEXION. NATURE AND ORIGIN OF THEIR CONTENTS.

From the previous exposition it follows that originally all positive law is people's law and that side by side with this spontaneous generation, comes legislation (often even in early times) enlarging and propping it up. Then by the progressive developement of the people, legal science is added; thus in legislation and the science of law, two organs are furnished to people's law, each of which simultaneously leads its independent life. If lastly in later times, the law forming energy, departs from the people as a whole, it continues to live in these organs. Then since the largest and most important part of the old people's law have been incorporated with legislation and legal science, that law shows itself very little in its original shape but merely appears through their medium. Thus it may happen

(a) L. 2. S. 5. 6. de orig jur. (1. 2.) This is not the place for examining to what extent, this historical statement is true.

that people's law may be almost hidden by legislation and legal science in which it lives on, and that the true origin of existing positive law, may be easily forgotten and misunderstood.(a) Legislation especially, in its external influence has such a preponderance, that the delusion easily arises that it is the sole true ground of origin of law and that all others must be considered in the subordinate position of a mere help or succedaneum of it. Law however is never in a healthy condition, unless these law-forming powers work harmoniously together, neither of them isolating itself from the others: and since legislation and legal science are the continuous product of individual consciousness and reflexion, it is also of importance that correct views of the origin of positive law, and of the true connexion of the powers co-operating in that production, should obtain and assert the mastery.

This intrinsic connexion of legislation and the science of law with people's law which also serves as their basis, makes it the more necessary to examine more narrowly

(a) This concealment of the spontaneous generation of law, by later forms into which the earlier materials have passed, is especially marked in a constant expression of the later Roman law. In the earlier time leges, plebiscita, senatus consulta, &c., would have been stated as law-sources. These had now passed entirely into the works of the famous jurists beside which existed the constantly augmenting imperial laws. At this later time therefore all law rested upon leges or constitutiones (imperial laws) and upon jus or prudentia (juristic literature.) It is thus stated in several passages of the commonitorium which prefaces the Visigothic breviary. L. 2. C. Th. de dot. (3. 13.) L. un. C. Th. de resp. prud. (1. 4.) Int. Cod. Greg. II. 2. 1. Edictum Theodorici in epilogo. Præm. Inst. S. 2. 4. Const. Deo auctore S. 1. 2. 9. 11. Const. Cordi. pr. S. 1. L. 5. C. quorum appell. (7. 65.) Justiniani Sanctis pragmatica S. 11. In like manner, the whole English law rests upon two bases, statute law and common law. What the imperial laws were in Rome, the acts of parliament are in England.

the quality of the contents of people's law. In it we find a two-fold element; an individual one specially belonging to each people and a general one based upon the human nature common to all. Both find their scientific recognition and sphere, in the history and the philosophy of law. Not a few of those, who in all times have busied themselves with the establishment of the nature of law, have treated the idea as absolute, without concerning themselves with its form in actual existence and with the influence of their thoughts upon its condition. Those also, who have sought to give to their scientific task a definite relation to the actual condition of law, have often in so doing been led to a one-sided treatment of law because they have recognized only one or the other of the elements of law specified—some of them because they have conceived the contents of law as accidental and indifferent and have satisfied themselves with the perception of the matter of fact as such; others by the setting up of a normal law overhanging all positive law which all nations would do well to substitute immediately for their own positive law. This latter one-sidedness deprives law of all life while the former misunderstands entirely its lofty calling. We shall avoid both errors if we recognize a general problem which it is the historical task of each people to solve in its own particular manner. The lively conflict upon these opposite views has indeed served to render that task more clearly and definitely understood; it has however often led to narrow failure to recognize the element of truth in the efforts of opponents. We ought not then to overlook the fact that in a research apparently confined to particulars, a sense of the whole, consequently of the higher import

of legal institutions, may show itself: in like manner on the other hand, a research general in its aim, may be pervaded by a perception of the historical life of the people. If one turns one's eyes from the utterances of party spirit (as worthless and transient) and directs them simply to the scientific aims of our age, one must be able to entertain the joyful thoughts of a closer approximation of opinion and hence of a real progress.

That general aim of all law is simply referable to the moral destination of human nature, as it exhibits itself in the Christian view of life; then Christianity is not to be regarded merely as a rule of life for us but it has also in fact changed the world so that all our thoughts, however strange and even hostile they may appear to it, are nevertheless governed and penetrated by it. By this recognition of a general aim, law is by no means dissolved in a wider province and deprived of its independence: it appears rather as an entirely peculiar element in the series of conditions of that general problem; in its own department it rules absolutely and it merely preserves its higher verity by that connection with the whole. It is moreover quite satisfied with the adoption of that single end and it is by no means necessary to place beside it a second end altogether different under the name of the public weal, by admitting besides an ethical principle, a politico-economical one entirely independent of it. Since political economy strives to extend our mastery over nature, it can only aim at increasing and ennobling the medium in which the moral ends of human nature are to be attained; a new aim however is not embraced in it.

If from this stand-point we regard the positive law of particular nations, we find in its generation the two

elements of law not as different, but as one and the same undivided operating power. However the two not seldom enter into a definite opposition to one another, in turn oppose and limit one another, haply afterwards to be dissolved into a higher unity. In this opposition appears to us the special or natural element, and each single part which is embraced as a logical consequence of it, as for example the bare letter of the law *(jus strictum, ratio juris)*(a); in such a locking up in the letter, the law itself is incomplete and narrowed, it has however the capacity, of adopting more and more general principles cognate to it, and of extending itself by them. The general element on the other hand, appears in its turn in different forms and more clearly and immediately in proportion as the moral nature of law is generally operative therein: the recognition of the like moral value and the freedom of men, the encircling of that freedom with the institutions of law and with all that follows as the practical consequences of these institutions, what the moderns call the nature of the thing, *(æquitas* or *naturalis ratio)* are such immediate appearances. The general element of law appears mediately and of more mixed nature: 1, as the regarding of moral ends without the province of law, and in the latest form of law the regarding of ecclesiastical ends; 2, as the regarding of the interest of the

(a) Roman technical expressions are used in this place not to establish historically the ideas which the Romans entertained but to make the present general statement clearer by associating it in the memory, with well known technical expressions. The connexion of that statement with the fundamental notions prevailing among the Romans, will follow in S. 22. The logical consequentiality is very distinctly expressed in the following text: L. 51. S. 2. ad. L. Aquil. (9. 2.) Multa autem jure civili, *contra rationem disputandi,* pro utilitate, communi recepta esse.

state *(publica utilitas, quod reipublicæ interest)*; 3, as a paternal care for the welfare of individuals *(ratio utilitatis)* e. g., the promotion of commerce, the protection of a particular class such as women or minors against particular dangers. According to this review, the grounds of arising of law may be classified in the following manner. They rest either simply upon the province of law alone *(jus strictum* and *æquitas)* or upon the conjoint operation of such principles as do not lie within the boundaries of the province of law, although they have, in common with it, the same general aim *(boni mores* and every sort of *utilitas.)* By this perception of the two elements of every system of positive law, the general and the special, a new and high purpose of legislation immediately reveals itself. Since the most powerful motive to the developement of positive law, lies in these two elements, it is of the last importance for the legislator to recognize with certainty that general end and approximate himself to it without weakening the free power of individual life. In this road there is much to be levelled, many an obstacle to be surmounted, and here the legislative power may render, to the invisibly working spirit of the people, the most salutary aid. In no task however is so much caution necessary lest one-sided views and arbitrary will should supplant the living prevalence and developement of law. Here especially a sense of real liberty is necessary to the legislator and this is often most wanting in those who talk the most about it.

SECTION XVI.

ABSOLUTE & MEDIATE. NORMAL & ANOMALOUS LAW.

In the consideration of the constituents of objective law we find two contrasts which, since they have

manifold influence upon the doctrines to follow, must be set forth in this place. In respect to the relation in which the rules of law stand to the jural relations governed by them (S. 5.) the following difference is found—some of those rules govern with an immutable necessity without leaving any play-room to the individual will: I call these *absolute* or *mandatory* rules of law. The grounds of this necessity may lie either in the very nature of the organism of law as it shows itself in positive law or in political and politico-economical views or immediately in ethical considerations (S. 15.) Other rules at first leave free power to the individual will and only take its place in order to give the necessary definiteness to the jural relation where that will has failed to exercise its power: these rules, which one may regard as interpretations of the will which has remained incomplete, I call *mediate*. The contrast between the two sorts of rules is very definitely acknowledged by the Roman jurists. They most frequently term rules of the first kind *jus publicum*,(a) *jus simply*,(b) *jus commune*,(c) or *juris forma*.(d) Sometimes they express specially the reference for the sake of which the rule has this quality, for example the interest of the state(e) or good morals.(f) The rules of the second sort, of which the nature mainly results

(a) L. 38. de pactis (2. 14.) L. 20. pr. de relig. (11. 7.) L. 42. de op. lib. (38. 1.) L. 45. S. 1. de R. J. (50. 17.) &c.

(b) L. 12. S. 1. de pactis dot. (23. 4.) L. 27. de R. J. (50. 17.)

(c) L. 7. S. 16. de pactis (2. 14.)

(d) L. 42. de pactis (2. 14.) L. 114. S. 7. de leg. (30. 1.) L. 49. S. 2. de fidej. (46. 1.)

(e) L. 27. S. 4. L. 7. S. 14. de pactis (2. 14.)

(f) Consultatio S. 4. in several places.

from their contrast with the first, have no such regularly recurring names.(g) The same order of thought is in part the basis of the division of statutes by modern writers into commanding, forbidding and permitting.(h) In this mode of division, the narrowing of it to statutes is first to be blamed, since the same contrast may occur in customary law. Moreover commanding and forbidding statutes are distinguished merely by the logical form of affirming and denying which, in itself an indifferent circumstance, cannot be the basis of the members of a division. Lastly permission is not that upon which the third class depends but it is rather the supplementing of an imperfect declaration of will. Permission can in general have a meaning only in reference to a previously conceived prohibition: whether it be that this is removed by the permission or narrowed by it in the way of exception. In fact one especially applies the expression to such laws as recognize a capacity for action in particular persons and therefore negative the denial of that capacity. There still remains one of the technical expressions cited which needs fuller discussion because its ambiguity has produced great misunderstandings. I mean the expression *publicum jus*. *Publicum* is generally *populicum*, that which stands in connexion with the *populus*. This fundamental expression involves the following varieties.

(g) Res familiaris, privata, ad voluntatum spectans, L. 7. S. 14. L. 27. S. 4. de pactis (2. 14.) L. 12. S. 1. de pactis dot. (23. 4.) L. 27. de R. J. (50. 17.) The difference between the two sorts of rules of law will be treated in the fourth chapter.

(h) Glück 1. S. 14. The cause of this division exists in L. 7. de leg. (1. 3.) where however there is one more member "Legis virtus est imperare, vetare, permittere, punire." Here however these cases stand merely as an unassuming view of the operation of law not as bases of a classification.

First by it may be meant the Roman people (which is the common meaning of the term) or the people of a single city.(i) Secondly the word *publicum* may refer to the *populus* as a whole (as the *ager publicus*, the *bonorum publicatio* and so on,) or to the individual members of that people (as the *res publicæ* in the common use of individuals.)(k) As to the special expression *jus publicum*, we may denote by it, entirely different relations of the *jus* to the *populus*. Thus *publicum jus* denotes first public law, *i. e.* the rules of law of which the people are the object matter; further the rules of law generally (objective law) which have their origin in the recognition of the *populus* (S. 7. 8.)(l) lastly those rules of private law, in which the *populus* has an interest *(publice interest, publica utilitas)* and which for that reason are independent of the individual will, therefore the absolute rules of law (note (a).) But the expression *publicum jus* is not applied merely to the rules of law (objective law) but also to the privileges of individuals (subjective law.) Hence is called *publicum jus* the common enjoyment by all, of streams and highways(m) in like manner the rights which appertain to individuals, as senators or as individual members of the general assembly of the people are called *publica jura*.(n) The neglect of these different though cognate meanings has frequently led to remarkable errors.(o)

(i) L. 15. de V. S. (50. 16.) L. 16. eod. L. 9. de usurp (41. 3.)

(k) L. 5. pr. de div. rer. (1. 8.) L. 7. S. 5. L. 14. pr. L. 30. S. 1. L. 65. S. 1. de adq. rer dom. (44. 1.) L. 6. pr. L. 72. S. 1. de contr. emt. (18. 1.) L. 45. pr. de usurp (41. 3.)

(l) L. 8. de tut (26. 1.) L. 77. S. 3. de cond (35. 1.) L. 116. S. 1. de R. J. (50. 17.) L. 8. 14. C. de Judæis (1. 9.)

(m) L. 1. S. 16. 17. L. 3. S. 4. L. 4. de O. n. n. (39. 1.) Similar is L. 40. ad L. J. de adult (48. 5.)

(n) L. 5. S. 2. L. 6. de cap. min. (4. 5.)

(o) Upon this error the work of Burchardi is mainly based: Grund-

A second contrast is referable to the difference of origin of the rules of law according as they have arisen, that is, from the pure province of law (be that *jus* or *aequitas)* or from a foreign department (S. 15.) . Since these latter intrude as foreign elements into the law, its pure principles are modified by them and in so far as they are so modified go *contra rationem juris.(p)* I for this reason call them *anomalous ;* the Romans call them *jus singulare* and base their ground of origin on the *utilitas* or *necessitas* different from law.*(q)* I call the law originating from the province of law the *normal;*

züge des Rechts systems der Römer aus ihrem Begriffen von offentlichem und Privat recht entwickelt, Bonn 1822. He treats the whole law of persons as jus publicum the law relating to things as jus privatum, and that relating to actions as a mixture of the two. I hold the fundamental idea to be erroneous, but the acute manner in which it is worked out renders the book instructive nevertheless.

(p) L. 14. 15. 16. de leg (1. 3.) L. 141. pr. de R. J. (50. 17.) In substance this is the same view which has been already taken by Thibaut. (Versuche II. n. 13.)

(q) L. 16. de leg (1. 3.) "Jus singulare est quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est. The name jus singulare also appears in L. 23. S. 3. de fid. lib. (40. 5.) L. 23. S. 1. L. 44. S. 3. de usurp (41. 3.) L. 15. de reb. cred. (12. 1.) ("Singularia quædam recepta.") Utilitas (supra S. 15.) as their ground of origin also in L. 44. S. 1. cit L. 2. S. 16. pro. emt. (41. 4.) Necessitas (not essentially different from utilitas) in L. 162. de R. J. (50. 17.) It is sometimes called benigne receptum L. 34. pr. mandati (17. 1.) Conf Brissonius v benigne and benignus. In many other places this singular, purely positive, law is called jus constitutum and therefore without any reference to the imperial constitutions as their ground of origin. L. 25. de don. int. v et ux. (24. 1.) L. 1. rer. am. (25. 2.) L. 20. S. 3. de statu lib. (40. 7.) L. 94. pr. S. 1. de cond (35. 1.) Alciati parerg. VII. 26. Otherwise jus constitutum merely denotes constitutional law L. 1. S. 2. quæ sent. (49. 8.) Uncertain as to this view Fragm vat. S. 278. and L. 22. C. de usur. (4. 32.) The antithesis of that singular law (jus constitutum) is jus vulgatum. L. 32. S. 24. de don. int. vir. (24. 1.)

the Romans commonly do not use any particular name for it, but in the Roman law the name *jus commune* is used for it.(r) By far the most common designation for *jus singulare* among the Romans, is the expression *privilegium*. Thus appear the privileges of soldiers as to testaments (s) those of several persons as grounds of excuse from guardianship (t) and especially frequently the term is used for the favour shown to certain creditors in *concursus* (u) as the *fiscus*, minors, claims of dowry and so on, and therefore especially among others for those demands, which have in later times, obtained the still greater advantage of a tacit hypothec: (v) in all these cases, *privilegium* means exactly the same thing as was indicated by the term *jus singulare*. If we seek more fully to comprehend this *jus singulare*, it appears as purely positive and generally referable to the will of a particular legislator.(w) More rarely it appears as the product of primitive national opinion and therefore without traceable origin: such is the prohibition of gifts between husband and wife which rests upon moral views, not upon a principle of law. (x) Moreover anomalous law appears in the logical relation to normal law of an exception to the rule: but this relation is a derivative one and the essence of the matter is not

(r) L. 15. de vulg. (28. 6.)

(s) L. 15. de vulg. (28. 6.) L. 10. de admin. (26. 7.)

(t) L. 30. S. 2. de excus. (27. 1) Fr. Vatic S. 152. but the expression is not common.

(u) Thus throughout the whole title de reb. auct. jud. (42. 5.) especially L. 24. S. 2. 3. L. 32. here they are called privilegiaric.

(v) Our especially common phrase, privileged hypothecs is not used by the Romans.

(w) Auctoritate constituentium (note (q.)

(x) L. 1. de don. int. vir. (24. 1.)

embraced by it. Lastly anomalous law (and this belongs to its character of an exception) appears constantly as confined to certain classes of persons, things or legal acts: this relation moreover is in the first place indefinite, since one can at pleasure form the concept of such classes, as for example the whole law of sale is of force only among the class of buyers and sellers. It is moreover like the previously mentioned exceptional relation, a subordinate one and many have quite erroneously attributed to it the nature of *jus singulare.* If this were the case we ought to be able to reverse the proposition and then every law of a special class must always be *jus singulare* which can by no means be admitted. Similarly Justinian's triennial *usucapion* applies merely to moveables but notwithstanding, there is not on that account any *jus singulare.* The privilege of minors in the *actio tutelæ* is a *jus singulare;* their incapacity to act is not so. The *Sc. Velleianum* is a *jus singulare* of women; their exclusive capacity of living in the matrimonial relation with men is not so. Consequently the restriction of a law to particular classes is not that which makes it *jus singulare.* In its most usual relation to single classes of persons, the aim is not, as in normal law *(aequitas)* directed to an indifferent dealing with all those interested but rather, in consequence of the *utilitas* intruding from without upon the law, it has for its object an advantage or disadvantage of this class. In the first case, which is the most common, that law is also called *beneficium.* (*y*) The important special laws as to heretics and Jews in the later Roman law are examples of the latter case. According to this exposition the concept of the *jus*

(*y*) *e. g.,* L. 1. S. 2. ad munic. (50. 1.)

singulare is a general, not an historical one. Nevertheless it may so far assume an historical character, when a principle originally foreign to the law is assimilated by it so that that which originally prevailed as *utilitas*, is in process of time received as *ratio juris*. This without doubt happened as to the obtaining of possession through the medium of free persons and the *singularia* as to loan seem as if they must be understood in the same way.(z)

Great confusion has entered this doctrine through people confounding the *jus singulare* with that which we now call privileges, for example with the special exceptions from the application of the rules of law, defined by the supreme power of the state. To render this clear it is necessary carefully to separate the relation of the concept from the terminology.(aa) Such exceptions as to individuals are not parts of the general law and hence are entirely distinguished from the *jus singulare*. They have in common with that law, the nature of an exception to a rule and also an origin from a one-sided declaration of the legislative power; but this latter resemblance is merely an accidental, not a general one, since it may also arise by contract. With the terminology, it is connected in the following shape. In the ancient language these individual exceptions were in fact called *privilegia*.(bb) In our law-sources on the contrary *privilegium* is the normal expression for the *jus singulare* and as above remarked is so

(z) L. 1. C. de adq. poss. (7. 32.) L. 53. de adq. rer. dom. (41. 1.) L. 15. de reb. cred. (12. 1.)

(aa) These rights will be exhibited below in the treatment of statutes

(bb) Thus in many passages of Cicero (Ernesti v privilegium) Gellius X, 20. conf. Dirksen civilistische abhandlungen B. 1. p. 246. seq.

employed in a great number of texts. The individual exceptions however are seldom generally mentioned in the law-sources and where they do occur, they are not marked by any regular technical expression but are sometimes simply described,(cc) sometimes called *personales constitutiones* or also *privata privilegia*.(dd)

(cc) L. 3. in f. C. de leg. (1. 14.) const. summa S. 4.

(dd) L. 1. S. 2. de const. princ. (1. 4.) L. 4. C. Th. de itin. mun. (15. 3.) see S. 24.

CHAPTER III.

SOURCES OF THE MODERN ROMAN LAW.

SECTION XVII.

A.—WRITTEN LAWS.

What has before been said of the nature of law-sources in general, shall now be applied to the modern Roman law, the special purpose of this work (S. 1—3.) That application requires us to specify the particular place, which, legislation, customary law and scientific law occupy as sources of the modern Roman law.

The four parts of the Justinianean legislation, which we are accustomed to include under the name *Corpus Juris*, come first under consideration as written laws: those parts are the three law books and the single novels published after them and under the limitations and in the special shape, which they received in the school of Bologna, since they were only so known, when from the influence of that school, the Roman law was established and recognized as a common law for modern Europe; and when four centuries later, new sources were gradually added to those earlier ones, their exclusive authority had been so long and so generally recognized, had so completely passed over into the practical condition of law, that it was wholly impossible to ascribe to the new discoveries other than a purely theoretical use. On this same ground the ante-justinianean law is excluded from all application and this exclusion has been recognized by all without exception. It would be wholly illogical, to be unwilling

to apply the same principle to the limits of the canon of the Justinianean sources. Hence therefore are excluded, the Greek tests in the Digest for which the translations received in the school of Bologna are substituted, the comparatively unimportant restitutions in the Digest and the much more important ones in the Code. Of the three compilations of the novels (*b*) which are extant in modern times, those only are to be recognized which we term *Authenticum* and these in the abridgment which they have undergone in the school of Bologna in which they bear the name of the *Vulgata.* (*c*) On the same grounds, or the oppositue direction, we must recognize in the Code, the extension which it received in Bologna by the admission of the *authentica* which proceeded from the emperors Frederick I and Frederick II, and equally the extension by the reception of the much more numerous *authentica* of Irnerius. (*d*) Nevertheless we must not extend the

(*b*) Compilation of 168, Julian, and liber authenticorum. Viener Geschichte der Novellen Justinians. Berlin 1824. 8°.

(*c*) Viener S. 258. 259.—Although individual jurists (few indeed in number) may have held different opinions on this point (Mühlenbruch I, S. 18.) the matter itself ought not on that account to be regarded as doubtful. If the principle here laid down is abandoned, it is utterly impossible to get rid of boundless arbitrariness.

(*d*) Savigny Geschichte des R. R. im Mittelalter B. 3. S. 195. 196. It ought not to be regarded as inconsistent when the authority of the gloss is presently denied while here the authority of the *authentica* of Irnerius is asserted, although these were nothing more than glosses for facilitating a comparison between the Code and the Novels. Since they were recognized merely as portions of the historical canon, without any strange ingredient, and as they were regarded merely as a convenience for citation, since the text or the extract could at pleasure be employed, it would be wholly contrary to the intention with which the *authentica* were received, if one wished to establish from them a contradiction to the text of the novels.

immediate influence of the school of Bologna beyond this determination of the sphere of the sources and in particular not to the doctrines wherein an exclusive generality was neither obtained nor even attempted (e) and as little to the criticism of the text, upon which the general efforts of the glossators are unmistakeable but never reached to a point of completeness at which alone there could arise any question of exclusive authority.(f) Still more important is the limitation of the application of the contents of that body (circle) of sources generally received. To this belong not merely the important exclusion of public law, from all present application (S. 1.) but also the exclusion of whole institutes appertaining to private law, as *e. g.*, the law relating to slaves, coloni, the stipulation. This material limitation is not like the formal one to be ascribed to the school of Bologna but rather to the re-action of other law-sources (customary law and scientific law) upon the written law. The limitation, in truth has not been always universally recognized; the critical spirit of later science has first succeeded in entirely removing the erroneous application of Roman law, which in earlier times was often attempted. The attempt made under the emperor Frederick I to use the Roman law for the

(e) In opposition to this opinion is the assertion, that the Italian legal practice expressed by the glossators, rather than the corpus juris limited by them has been received by us. (Seidensticker Juristische Fragmente Th. 2. S. 188—194.) This opinion is to be the more peremptorily rejected that the object of the glossators was merely to interpret, and not to set forth practice but to reform it. (Sav. G. d. R. R. i. m. B. 5. Cap. 41. n. 1.) The true element existing in this erroneous view is that the doctrines of the glossators have had no small influence upon the practice of German law.

(f) Sav. G. S. 175.

firmer establishment of the imperial power, is an example of the manner in which the glossators were induced to misunderstand those natural limitations.

So far as the non-prevalence of the unglossed or restored texts of the *corpus juris* is here asserted, the limitations which have been stated under which the Roman law has been received as written law, have not remained unimpugned. The majority of theoretical and practical writers indeed agree in this assertion and regard each departure from this principle as an evident error. (*g*) The assertion however has not wanted opponents. Individual authors have gone so far, as to ascribe validity as law to the novels of the emperor Leo VI, (*h*) without considering that in the time of that emperor (about the year 900,) the authority of the Greek emperors over Italy had long ceased so that there no longer existed any bridge by which Leo's legislation could have reached us, as that of Justinian did. More specious is the opinion of others which confines the force of law to the restored texts of the Justinianean law, or even to a part of them, or at the least regards the question as doubtful. (*i*) They have conceived the

(*g*) Lauterbach proleg. S. 5. num. 6. 7. Eckhard hermeneut. S. 282. Brunnquell hist. j. 2. 9. S. 22. Zepernick upon Beck de novellis Leonis Hal. 1779. P. 552. sq. Glück I. S. 53. 56. Weber Versuche über das Civilrecht. S. 47.—49.

(*h*) Beck de novellis Leonis ed Zepernick Halæ 1779.

(*i*) Beck I, c. S. 48. Mühlenbruch 1. S. 18. Dabelow Handbuch des Pandectenrechts Th. 1. Halle 1816. S. 50. This last lays down the following position. According to the older use all the unglossed parts were invalid; in the more recent, since the glossed editions disappeared, the unglossed novels only continued invalid, the remainder of the unglossed parts are still valid (P. 199. 200.) On the other hand even now "the so called leges restitutæ have no practical application," so that in this particular there is no distinction between the old and

matter as if the restrained validity was based upon the exclusive use of the glossed editions and since these became disused and were superseded by more complete editions (that of Gothofredus. *e. g.*,) the whole contents of these are to be regarded as received. The matter however has never had so material and accidental a connexion; the reception was rather recognized and settled in definite limits, long before people thought of printed editions or still less of a difference between them. It may indeed be said that the same capability and privilege as to reception, as existed in earlier times, still survived in the sixteenth century, in which, the restitutions for the most part took place. Reception however is a matter of fact not to be concealed and which does not take place without solid reasons. Such have evidently not been wanting to the actual reception; if for example the Digest had at that time remained incomplete and perchance in the sixteenth century the *Infortiatum* had first been discovered, it could scarcely have failed to obtain reception. As to the texts then restored, isolated laws, a like motive for their reception, was partly on account of their ambiguous or wholly objectionable contents, entirely wanting and no single general opinion has advocated their reception as a whole. It can therefore merely be a question whether single texts of this kind, on account of any excellence in their contents, are to be received. This has been asserted to be the case with the L. 4. C. *de* in *jus vocando* (restored by Cujacius) whereby the neglect of the *lis pendens* is punished with the loss of the suit; this text is quoted by name in a judgment of the

new usage. He has also the highly original notion of distinguishing the unglossed from the restored parts. The two are in fact exactly as different from one another, as the Digest and the Pandects.

imperial court and is made the ground of a threat of punishment.(k) If this did not happen from pure oversight, from which even the tribunals of the empire were not privileged,(l) then it is easily understandable, that the tribunal would have welcomed a law by which it could enhance respect to their supreme jurisdiction; the principle would not on that account have passed into the general legal procedure of Germany. The authority of the supreme appellate tribunal of the Polatinate is quite erroneously cited, as stating the (restored) L. 12. C. *de aedificiis privatis* as the basis of a decision, while there as the ground of the decision, the force of law is definitely denied to that text.(m) If

(k) The imperial chamber made such an order on 23d Dec. 1650 in the matter of Waldeck v. Paderborn et consortes concerning the earldom of Piedmont. It is printed in full in Er Mauritius de judicio aulico S. 14. (Kelon 1666 and in his Dissert. et opusc. Argent 1724. 4° P. 337.) The text runs thus. "We require and cite .... to see and hear, your excellency and you, on account of your disobedience and abovementioned acts, the declaration of the condemnation to the penalty which you have subjected yourselves by virtue of the provision in C. ult. S. ult. C. de in jus. voc. Many authors understand this text as if a multitude of such decisions had proceeded from the imperial courts. *e. g.*, Andler. jurisprud. qua publ. qua privata Salisbaci 1672. 4° p. 434. Pütter de præventione S. 19. 90. 135.

(l) One might readily suspect such an oversight from the manner in which Uffenbach de consilio aulico C. 12. P. 155. expresses himself upon the matter "addition interdum citatio ad videndum se incidisse in pœnam L. ult. C. de in j. voc. .... et quamvis *quod pauci hactenus observarunt* praedicta L. ult. non authentica sed a Cujacio restituta *consequeater spuria est* et hinc adeo secure cum illa neutiquam navigari videatur, hoc tamen non obstante Du. ab Andler quotidianam praedictae L. ult. praxin confirmat" &c. Now the only proof furnished of this is the mandate of 1650 contained in the preceding note. One may now so far give in to the opinion of Dabelow (note *i*) that the extended use of more complete editions, might easily have led to this oversight, which would, at an earlier time, have been impossible.

(m) J. W. Textor decisiones electorales Polatinæ Francof 1693-4.

now on these grounds nothing can be conceded as to the established limits of the received law, on the other hand the scientific use of the restored texts (which may also have an influence upon the formation of practical law) is in no way to be disputed; it is just as unquestionable as the scientific use of the texts as to antiquated law-institutes (*e. g.*, slavery) as also of the pre-justinianean law-sources. That influence is merely from the nature of the contents much narrower and less evident. Gaius and Ulpian enlighten us upon much which would otherwise, in the Digest, have remained obscure to us; those restored texts on the contrary are single modifying laws, which throw no new light upon the rest of the law and as to them the only question which arises is whether they shall be immediately applied or not. Thus *e. g.*, as to the L. 22. C. *de fide instrum*, there can merely be the question whether a party to the suit, is entitled to require, that a third person should communicate his documents or not; in the same way as to Nov. 121. 138. concerning the calculation of interest over double of the principal. The prior law prevailing independently of these statutes, becomes in no way clearer through them. On the other hand the case perhaps happens, that upon a

Decisis XX. The complainant surely enough had relied upon that lex restituta but the court distinctly asserts (p. 81. 82.) the entire invalidity of this and every other lex restituta, where the proposition contained in it had never been received by special customary law. This may at the best have been the case as to the decision of the imperial chamber in the matter W. v. P. (note *k*.) It is quite inconceivable how Beck de novellis Leonis S. 48. quotes the decision of the palatinate court and thereupon can say of the L. 12. C. cit: excitatam tamen pariter ad causæ definitionem in supremo appellationis judicio Palatino docet J. W. Textor. He must understand the words as if the court had made the law, the basis of its decision, whereas exactly the contrary is said.

question of law there exist contradictory texts of the Digest and that upon that very question an unglossed novel of Justinian pronounces itself; although this has not the force of a law, nevertheless the force of a very weighty authority is not to be denied to it, and thus reference has rightly been made by practical writers to the unglossed novels.(n)

If therefore particular decisions are found in which the restored parts of the Justinianean law may have been directly used as laws, it is manifest that by so rare and isolated decisions, the principle here laid down, can neither be abrogated nor rendered doubtful, since its truth is in general constantly recognized by the writers theoretical and practical of all centuries.

Besides the Roman law the *canon law* requires here to be treated as written law in so far as it has developed and modified the institutions of Roman law; since also this has found a like general European recognition with the Roman. However this recognition can only be certainly asserted of the following compilations, the *decree* of Gratian, the *Decretals* of Gregory IX, Sextus and Clementine.(o)

If lastly the modern Roman law is conceived in the particular form which it has obtained, as the common

(n) An example is the unglossed Nov. 162. The purely scientific use of the law-sources before and after Justinian, may be illustrated by two very suitable analogies. The same sort of use must be asserted of the ancient German law-sources in the countries subject to common law and of the Roman law in the countries furnished with new codes (Prussia, Austria, France.)

(o) Eichhorn Kirchenrecht I. S. 349—360. The reception of the two collections of extravagantes is disputed but these are not of importance for the only matter here in question, the modifications of the Roman private law, so that for our object, the dispute is unimportant.

law of the German empire, the statutes of the empire are of the number of the laws to be applied in so far as the institutes of Roman private law have been modified thereby. These modifications are, in their compass far less important, than those based upon the canon law.

SECTION XVIII.

B.—CUSTOMARY LAW.

We have next to show the place, which the people's law or customary law, above generally explained (S. 7. 12.), occupies among the sources of the modern Roman law.

When Justinian began to reign, the indigenous people's law of the Romans, had in that form long been invisible. Already in the time of the republic, the most important part of it had passed over into decrees of the people or edicts and what remained along with them, as purely customary law, the juristic literature incorporated, so that it merely appeared as scientific law. At the extinction of literature, that vigorous national power, which is required for the formation of new law, almost failed, and when at times an external need urged them to such formation, it almost always devolved upon the imperial legislation to give to the new institutions of law, a definite shape.(a) It would therefore be scarcely conceivable, that a pure customary law should have been able to continue, as common Roman law side by side with the Justinianean law books, since everything of consequence, which had formerly arisen in this way, would have infallibly found its place in the Digest or the Code. On the other

(a) The so-called peculium adventitium and the donatio propter nuptias may serve as illustrative examples.

hand much special customary law might have existed beside this general legislation, without our being in a condition to define even conjecturally its compass and importance. Under Justinian's successors, the same state of things must under similar conditions, have the rather continued, that his legislation was the last great effort of this kind and after him the power of forming law more and more disappeared.

The case was wholly different when in renovated Europe, the Roman law found an entrance into nations in which it had not arisen. At that time those nations had already arrived at a condition, in which the arising of a common customary law, was difficult and especially of a customary law by which the Roman law, strange to them, could be extended and developed. However circumstances arose which were favorable to such a common customary law. By the reception of the foreign law, an artificial and complex condition of rights was generated, which could only be regulated by the formation of much new subsidiary law. This need might have been satisfied by a considered and active legislation if such had been possible in the character of those states. Since this failed, the only remedy was customary law, to the arising of which the fresh and youthful power of the nations was favorable. Only the particular mode, in which the need had arisen, necessarily gave to this customary law itself a peculiar character. It was not, in the degree that other people's law was, the common possession of the nation but it from the very beginning assumed a scientific nature, as will presently be more precisely unfolded (S. 19.)

The greatest and most remarkable action of a common customary law in this beginning of the modern age,

was the very reception of the Roman law itself, and especially its reception within the settled limits which have already been stated (S. 17.) This reception moreover had a different significance in the different nations of modern Europe, so that the changing of the state of law, which resulted therefrom, must have been felt in very diverse degrees. In Italy the Justinianean law had never disappeared: here were new, partly its revival and partly the special and definite limits in which it was henceforth recognized. In France too, the Roman law had certainly not disappeared, but the special shape, which it had in Justinian's legislation, was here quite new. Far more perceptible must the reception have been in Germany, where the Roman law itself was an entirely new, hitherto unknown, element of law certainly adapted to the relations of life which had newly arisen, since on that account only, it could have found an entrance. Here a long and lively struggle preceded the reception, and hence this influence of customary law was equally prepared for and established. Our whole attention ought not to be directed, to the mere reception of the Roman law, as a decided influence of customary law, but as much and even more to the definite mode and limitations in which this reception took place, since it follows from these, that the reception, was attended by a clear consciousness, and must not be regarded, as in any way whatever, the work of accident apart from reflection. This reception, consummated in a definite way, must not be regarded as instantaneous and immediately concluded, since it came at first partially and gradually to a completed developement; this is especially the case as to the material limitation, by which an important part of the contents of the Roman law, is excluded from reception. In this

lofty vision of a common customary law appearing uniformly in many nations (although not at the same time,) the peculiar nature of the whole modern age, reveals itself. These nations received a whole system of law, which had not arisen in them but in a foreign people, with which some among them had not even a cognate origin. Thereby is shown, that the vocation of modern nations was not, in the same degree as that of the ancient, to an exclusive nationality but that rather their common Christian creed had wound round them all an invisible bond without removing their national peculiarity.(b) Herein lies the great course of developement of the modern age of which the final limit is still hidden from our eyes.

In the modern age a particular customary law appeared side by side with the general and it had, in arising within a narrower circle, as formerly in the Roman empire, less difficulty to contend with. It might arise within this narrower circle from a really common consciousness of law and therefore in a purely popular manner, without first being prepared, and mediated for, by science. In this particular customary law, the purely German relations of landed proprietorship (fiefs, allodial estates, base fees,) have been preserved and developed very extensively together with the law of inheritance attaching to them—relations which are destined to overreach the duration of individual lives and which are ordinarily connected, in numerous situations with continuing and homogeneous manners and occupations. In a similar way we see that in cities, the community of industrial relations among merchants and artisans has especially produced peculiar customary

(b) Savigny Geschichte des R. R. im. Mittelalter B. 3. S. 33.

laws, which introduced special modifications even into the law of succession (by community of goods in numerous forms); however there remains here a freer scope for the application of the Roman law. On the other hand we find a much more limited influence of particular customs upon the legal institutions already existing in Roman law of which only a few new determinations by means of custom, established themselves, through the daily recurring and uniform need, *e. g.*, the right of building in respect to neighbours, the law of tenancy and the relation of domestic servitude. Thus therefore particular customary law has always remained, of great importance in the indigenous German law, less important in the developement of the Roman law.*(c)*

This two-fold customary law, general and particular, is not merely to be recognized in the past, along with written law, as a source of the modern Roman law, but it may also appear as developing it in the future.

In this special application, the same nature must be ascribed to it, as was above represented to prevail in customary law generally. It therefore arises from the convictions of the community not from the wills of individuals, whose opinions and acts must be regarded merely as tokens of that community of convictions. Habit and practice, that which we especially call custom is hence in substance, a medium of recognition, and not a ground of origin, of that law. If lastly, we look at its operation in relation to written laws, we must ascribe to these law-sources a complete similarity. Written laws therefore may not only be enlarged and

(c) Very good observations on the materiality of this distinction are found in: Götze Provinzialrecht der Altmark. Motive I, S. 11—13.

modified by fresh customary law, but also be put out of power (S. 13.) and customary law may merely enfeeble the law or put a newly generated rule in its place.(d)

SECTION XIX.

C.—SCIENTIFIC LAW.

In ancient Rome, long before there was any thought of a science of law, people's law had, in early communion with legislation, brought forth a highly remarkable and peculiar form of law. When however scientific life generally, arose in the nation, that science naturally applied itself also to law, wherein it found prepared for it, an object-matter as worthy as it was truly national. The order of jurists, which was now formed, was in great measure the depositary (bearer) of people's law, of which the creative power, in its original form, presented itself to view more rarely. If therefore legal science was merely a branch of the common scientific life arisen in the nation, that science had an entirely peculiar course of developement. It came more slowly than other sciences to the maturity, destined to be attained among the Romans and it reached the height of its completeness at a time, at which science and art generally were already evidently in their decline. This divergence in the periods of formation was in fact of great benefit to Roman legal science, because its more

(d) The meaning and importance of these positions here stated in a very abstract way will be rendered clear below (S. 28. foll.) On account of the opposed opinions of modern writers, I do not establish more narrowly here, the conditions of true customary law, for which this would be the natural place, if it were not desirable, on account of the widely spread errors of modern theorists, to establish critically the true conditions in connexion with those erroneous opinions and in contrast to them.

tardy developement was at the same time more thorough and more peculiar, and it thereby secured to itself an enduring influence, upon foreign nations and later ages, such as the Romans did not attain in any other department (circle) of science. This arising of legal science as the result of a general scientific impulse of the nation, connected itself with the natural, and by foreign influences undisturbed, developement, by which the Romans distinguish themselves in their legislation from other nations. It is difficult for us to attain to a correct conception of the way in which the Roman Jurists operated upon the formation of law (not merely upon the knowledge of it,) since it is so natural imperceptibly to transfer the view of our circumstances to an age entirely different. Among the Romans, the jurists had a very remarkable position in consequence of, the free and beneficial exercise of their calling, their moderate number, and in great measure also in consequence of their high birth. They lived for the most part together, in the higher places of the world, in the neighbourhood of the Prætors and afterwards of the Emperor and therefore with enduring influence upon them. Nothing was more natural, than that the common opinions of this order, opinions which in great measure determined the formation of law, and the opinions of each single one of them particularly if distinguished by genius, should have a notable share of this invisible power. Among us is called a Jurist each one who has studied jurisprudence in order to use it as judge, advocate, writer, professor, consequently almost always to attach himself thereby to a lucrative calling. These jurists are scattered in immense number over the whole of Germany and form a very mixed company by their great diversity in intrinsic worth. Naturally here

the operation is much more indefinite and moderate; it needs a longer time before a common opinion obtains decided recognition and it must still more be dependent upon accident how a particular mode of culture or an opinion attains here or there to an influence upon legislation and through this upon the formation of law.

We find a state of things, quite different from that of ancient Rome in the middle ages when the Roman law was received by a great part of the European states. This reception generated an artificial condition of law (S. 18.,) the difficulties of which could only be surmounted by a higher degree of legal knowledge than is conceivable as the common property of the nations. From this necessity arose a juristic school and literature without being called forth by the general state of culture of the people. Here also as in ancient Rome, although here in an order exactly reversed, legal science had its peculiar period of culture differing from the periods of culture in general; since instead of legal science attaining its full bloom later than the other sciences as it did in Rome, legal science in the middle ages arose much earlier than the general scientific life of the nations awoke. The isolation therefore in which during a long period, legal science found itself greatly enhanced the difficulty of its existence, and rendered a complete cultivation of many parts of it impossible; but the more strenuous exertion, which was hence a necessity to the glossators, gave to their work an earnest and worthy character, and the remarkable success, which attended their work, under conditions of such difficulty, still claim our admiration.

In these circumstances, people's law, except so far as it confined itself to a narrower circle, was from the

beginning identical with scientific law so that it was not operative outside that law, and the practical need of the people found its expression and satisfaction in scientific law alone (S. 18.) Hence legal science itself became of a peculiar character and it was in conformity with this condition of it, that in the business of the jurisprudents, theory and practice remained intimately united and that the operation of practice has served to protect theory from sinking entirely.(c) In the succeeding centuries legal science went through many degrees of culture and had a very checquered existence, but its general relation to the mere generation of law continued the same as that already ascribed to it in the middle ages.

The products of that intellectual activity, which from the moment of the reception of the Roman law, were directed to it, are however in compass so vast and in kind so various that a special enquiry is needed as to the sense in which those intellectual products are to be regarded as sources of law and as to the manner in which we are to treat them. For this purpose we may distribute the whole labour of the jurisprudents lying before us into two great masses, *theoretical and practical work*. However these expressions, the opposition of which is often very differently conceived, require more careful definition.

I here call theoretic every purely scientific enquiry whether directed, to the establishment of the text of the sources, to their explanation, to the working of them out to the results of a system of law or to the internal perfecting of this system. By these operations no new law is generated, but merely the existing law

(c) Savigny G. R. R. i. m. Bk. 6. S. 20.

rendered more clearly understood and so far this work cannot, at first sight, be numbered among law-sources. However as a great authority, it assumes a like nature; for although the freedom of judicial decision is not narrowed, for those willing to put to the test this work in an independent manner, how many soever the writers who agree upon a newly expressed opinion, still there is always a class of judicial functionaries numerous as respectable who are not in a condition, by the thoroughness of their training, to apply to the new opinion their own independent criticism and thus attain to a conviction of their own. It is not merely natural but commendable and desirable, that these should follow unconditionally that authority. This procedure is recommended here not merely in the interests of convenience but of the certainty of the law itself, since this cannot possibly be obtained, if a judge without the possibility of a comprehensive study seeks to form an opinion of his own upon each particular question of law which from the one-sidedness of its origin will be of very accidental and doubtful success. This principle in particular can alone obviate the danger of a judge of special activity being hurried away by the superficial show of any new doctrine to the greatest injury of the administration of law.*(d)* If at any time a specially learned man is found upon the bench, to him the right will not be denied of establishing in the administration of law, his own well grounded and examined conclusion. The mode of recognizing such real and good authority cannot be brought to any definite and formal external rule. It cannot arise from the number of concordant

(d) Upon the value and the nature of authority in the administration of law compare the excellent essay of Möser patriotische Phantasieen I. n. 22.

writers and still less can be conceived to arise in a continuing conflict of opinion, from a numbering of voices. It rather depends upon those jurists who have a reputation for thoughtful and thorough examination agreeing in such an opinion and upon a contrary opinion evidently worthy of consideration and supported with reasons not being continually maintained by any one among them. This new opinion will naturally be received only when for a certain time it has been the object of public examination, although no one will undertake to settle a fixed term of years for that examination. In this relative sense therefore a theoretic work may itself be numbered among the law-sources, since under the conditions stated, a really well grounded authority must be ascribed to it. The theory as to the two degrees of *culpa* may serve as an example; that theory has in our days been quite as generally received as that of the three degrees, previously and for a long time had been. It follows from the nature of the authority here described, that it must not itself be regarded as conclusive and unchangeable since a future and deeper enquiry may once more modify the opinion now received and then it has a no less rightful claim to make than that formerly recognized in its predecessor.

SECTION XX.

SCIENTIFIC LAW.—*(Continuation.)*

I here describe on the contrary as practical law every research which is not confined to the mere contents of the sources but also keeps in view the relation of those contents to the living condition of law in which it is to exercise influence, therefore the condition and need of the modern age. What outer manifestation such an

enquiry has may be treated as indifferent or subordinate —whether teaching and writing or the necessity of deciding an existing litigation be the medium of that resulting manifestation. In both cases therefore this enquiry is an organ of customary law and likewise a part of scientific law, since each decision of trained judges and especially when formed into bodies (colleges) of itself bears a scientific character (S. 14.) Herein therefore is verified the essential identity of customary law and scientific law, which has been asserted as a characteristic of more recent centuries. Under the head of practical labours in this sense therefore, I place dogmatic writings when they have had this particular direction, as collections of *consilia, responsa* and decisions whether these have proceeded from individual jurists or from colleges of them as *e. g.* from faculties of jurists or from superior Courts. By here contrasting the practical works of writers with the theoretical it is by no means meant that each individual work must belong exclusively to one of these classes. The great majority partake both of a theoretical and practical character sometimes with one of them predominant but often working with equal force in the two departments.

The question which arose above as to theoretical, arises also as to practical works—how are we to recognize the valid and genuine and be able to distinguish it more certainly from the invalid and the spurious. This question has here a still higher importance and hence requires a more careful discussion.

When a case is submitted for the decision of one unskilled in law, he will generally decide it according to a confused impression of the whole and nevertheless if of sound sense and decided character will believe

himself to be very sure of his point. It will however be very much a matter of chance whether a second of like qualities will give the same or the opposite decision. Science now will individualise and separate the jural relations and the rules of decision, so as thereby to convert that confusion into clearness and to remove from decisions, the uncertainty and accidental character which result from that confusion. In this is shown the great mastery of the Roman jurists, which is indeed aided by a very definite terminology and especially by the rigid marking out of individual actions; it would however be an error to regard this advantage as accidental since it has rather been produced by the law-forming impulse in-dwelling in the nation. This advantage, and likewise the still more important one of a law completely indegenous which has grown up with the people, are wanting to us: the task however and the possibility of accomplishing it, are equally present to us. If we now examine without prejudice the compass of that, which has been handed down to us from earlier times as practical law, differing from the Roman but as a remodelling of the institutions of Roman law, we may divide it into two heterogeneous parts. One part is of a healthy nature, resting upon new necessities which have been naturally produced by the change of the circumstances, among others by the greatly changed nature of the courts, partly also by the moral view of life changed in a great measure by Christianity; to this part we must, according to the views already unfolded, ascribe the force and reality of a customary law scientifically recognized. Hence it is a matter of indifference when earlier writers have erroneously attempted to derive such propositions from the Roman law. This error cannot lessen the truth of the propositions themselves; only we must

not delude ourselves with the idea that the erroneous deduction was a mere pretence. Those jurists were perfectly sincere and we must regard as an essential portion of our task, the exploration of the real Roman law in such cases, not for the purpose of maintaining it, but of establishing the real extent of the alteration. Another part of practical law on the contrary, has proceeded from the absence of principle mentioned above, therefore from scientific incompleteness; this it is our business to expose and destroy and not permit it to defend itself by a long, undisturbed, state of possession —and the more so that in great measure it may be shown to involve an innate contradiction therefore defective logic. All that bears this character has merely the false appearance of a practical law: it is bad theory and must give place to a better.(a) A critical separation of these two parts has not hitherto been attempted, because people have for the most part confined themselves to the adduction of the testimony of particular practical lawyers, selected at pleasure, for or against the present validity of whatever legal proposition may be in question. It is impossible to lay down beforehand, a general rule for that separation: this work must rather proceed from particulars and it may be for the time doubtful how far this criticism of particulars will permit of being brought to a general point of view. This critical examination of practice in details will also therefore be a main object of this work—a task of which the great difficulty will serve as an excuse for the frequently incomplete accomplishment of it. Regarded from another point of view, this task may be thus expressed—

(a) The Summariisimum as it often appears in modern practice may serve as an example illustrative of this case. Conf. Savigny Recht des Besitzes S. 51 of the 6th Ed.

to separate that which in the Roman law has perished from that which survives and in great part will continue to live. The main condition of the accomplishment of this task is a pure unprejudiced desire of truth. He is unfit who from a predilection for the Roman law enters upon it, merely with the view of re-establishing in its purity that law: as also is he who founds it upon his own conceptions of the modern practice and ascribes to it a complete independence never thought of by its authors—the one because he treats as living, a dead piece of history—the other because he regards his own delusion as reality.

That part of practical law which I have designated as sound has an entirely different importance from that above ascribed to the theoretical work. It operates not merely as an authority commanding respect but it in fact embraces in itself newly formed law. However we must not ascribe to it any exclusive, unchanging existence. True it is that the validity of any particular preposition of practical law cannot be impaired in consequence of a theoretical examination showing that it deviates from the law according to the sources, because it has obtained, as real customary law, an independent existence. Moreover it is not to be doubted that it may again lose its validity in the same way in which it arose.

The influence of practical law, has often been explained quite differently for it has been asserted by some that a Court was bound by several uniform decisions to adhere unchangeably in the future to the rule followed in them.(b) On this matter the truth is that in such

(b) Thibaut S. 16. and many earlier writers. Puchta handles this matter very well. Gewohnheitsrecht 2. S. III.

cases the Court forms an authority for itself which it will be more commendable and beneficial to respect than with inconsiderate inconstancy again to abandon: and this again like each custom rests upon the law of continuity already observed upon (S. 12. *(a)*) If on the other hand a renewed and careful examination furnishes new and previously unconsidered grounds, the abandonment of the rule previously followed cannot be blamed and especially there is no ground for desiring to exclude that abandonment by the arbitrary adoption of an unchangeable rule which has arisen in the manner described. The influence of the decisions of a higher tribunal upon the courts subordinate to it, is of a wholly different nature. In this case there operates not only an authority entitled to respect but the power belonging of right to the higher tribunal, of giving effect to its convictions by immutable decisions. In submitting itself to the view discrepant from its own, the subordinate court is not yielding to any external power whatever, but is rather entering into the meaning and beneficial intention of the establishment of courts of grades of jurisdiction or in other words of appellate courts.

In the whole of this enquiry special technical expressions, have been designedly avoided; the very indeterminate and shifting use of them has in this department led to a prevailing confusion of the concepts. It will now be sufficient to state briefly their different meaning in modern writers and of their relation to the genealogy of the concepts, here set forth.

The expression PRACTICE OF THE COURT first requires notice. By it is sometimes understood the real customary law evidenced by decisons—sometimes the uniform decisions of one and the same court, which nominally

have a binding force for the future. It would be convenient to apply this expression, as well as that of PRACTICE to the first idea, consequently to the real customary law so far as it is ascertainable from decisions. It is besides especially necessary to warn against a very frequent and pernicious misuse of these expressions. It is, for example, enough for many who are desirous of basing a legal proposition upon practice if they prove the recognition of that proposition in single decisions. Since however judges as well as authors are subject to error, such decisions also may have proceeded from pure ignorance of the law. Here therefore as well as in the case of writers, a more general agreement is wanting and this is absolutely excluded by several decisions running one against the other.(c)

This is the place also for the expression OBSERVANCE or *Usage* which is used in a manner even more fluctuating than the foregoing. It is often confined to public law and it then denotes what in private law is called custom.(d) In private law it is often used quite synonymously with customary law and then it is superfluous and better avoided.(e) The most definite use

(c) Comp. upon the agreement of writers S. 19. and upon the not absolute capacity of decisions to the forming of a customary law S. 29. Num. 4. One must hence be very suspicious of the favourite formula; Praxin testantar, &c.

(d) Pütter inst. jur. publ. S. 44.

(e) Hofacker S. 127. Thibaut S. 16—so also in individual texts of the law sources S. 7. J. de satisd. (4. 11.) cum necesse est omnes provincias .... regiam urbem ejusque observantiam sequi. L. 2. S. 24. de O. J. (1. 2.) "Vetustissima juris observantia." Clem. 2. de appell. (2. 12) "antiquam et communem observantiam litigantium sequi." In other places the word is used for more frequent observatio: respect for or following of a rule; which therefore has nothing to do with this matter and still less has the very frequent use of the word in the classical writers: respect for the person. Cicero de invent. 2. 22. 53.

of the word is perhaps that by which it simply denotes a customary law but merely the customary law of a defined class of persons *e. g.* of a definite order or also of the members of a corporation.*(f)* It is merely a modification of this meaning when by this expression is understood a statute of the corporation tacit and expressed in their acts and based upon the right of autonomy inherent in it.*(g)* On the contrary, we must call it an entire alteration of that most definite meaning when the word is used to denote a tacit contract of the members of the corporation.*(h)* In this case it would be far better entirely to avoid the ambiguous expression and only use the safer expression—contract. On closer examination it will be found that when most people employ the name *observance,* customary law and not contract is the matter before them and that the cause of the idea of contract being attached to it, lies deeper; for example there are many jural relations, in which it may in fact be doubtful whether they are subject to a determination by customary law or by a tacit contract of the individuals participating in it. On account of this doubt or rather of the obscure conception of the matter, the use of this shifting expression

(f) Eichhorn Deutsches Privatrecht S. 35. Mühlenbrüch S. 40. Personal in contrast to local pecularity is the basis of the concept so that one may properly speak of an observance of, the nobility or a certain class of them, a chapter, a corporation &c. but not of that of a province or town.

(g) Eichhorn Kirchenrecht B. 2. S. 39—44. Puchta Gewohnheitsrecht 2. S. 105, who has more definitely than any other, determined the difference between observance and cognate ideas, will allow the word observantia to apply to the single case (application of the autonomy.) In truth the confusing of these ideas would be best obviated by fixing the use of the expression in the manner proposed by Puchta.

(h) Meurer abhandlungen. num. 6. Hofacker S. 127. Thibaut S. 16. See for the opposite view Eichhorn ut supra S. 11.

was resorted to as the easiest way out of the difficulty. However the evil was not removed by that but rather rendered incurable because the recognition of this doubt and therefore the indispensable decision upon it were impeded.

Lastly we have still remaining the expression *communis opinio* to which in the early centuries an uncommon importance used to be ascribed. By it was implied so general an accordance of teachers of law, that each individual teacher must be regarded as bound by it and by reason of the importance of the result, an attempt was made to establish by formal rules, the idea and conditions of the generality, as at one time Valentinian 2 had done by a law.*(i)* They found themselves in that attempt in the domain of pure arbitrariness and the frequently very singular rules established were quite consistent with their origin. The correct import of a common opinion and its real application have already been explained (S. 19.) In modern times there is no more talk of this technical expression.

SECTION XXI.

CONCURRING LAW-SOURCES.

In the previous exposition of the sources of the modern Roman law, they have been represented as if existing alone and self-contained. This mode of treatment was necessary in order that they might be purely and completely comprehended, but so isolated an existence they have practically never had in the nations into which they found an entrance. A survey therefore will now be taken of those law-sources heterogeneous

(i) Puchta Gewohnheitsrecht I. S. 163.

to them which have come into contact with them and with which in actual life, they have shared the dominion over the jural relations.

First, at the very time of their reception, they were met by the indigenous law—in Germany therefore by the indigenous German law and so in most other countries especially in France. The relation of these two heterogeneous systems in their application to life, was at all times difficult and complex and the reconciliation of this conflict was always one of the most important tasks of scientific law and especially in the practical part of it (S. 20.)

Then to the received foreign law was everywhere added a continuous national legislation, which was urged on, partly by the just mentioned necessity of assimilation with the Germanic law, partly with no reference to this conflict by the new practice which was recognized and established in this national legislation. In some parts of Germany, therefore, the whole territorial law, which sometimes applies to a whole country, sometimes to particular parts and of which the compass and importance are very different in different countries, belongs to this category. The idea of common law given above (S. 2.) stands in contrast with this territorial law in the relation of a subsidiary law, so that it can only be applied so far as no different determination of territorial law exists. This relation follows naturally, even necessarily from the fact that such new legislation, actually arises from the necessity of continually improving the existing law and therefore has that improvement specially in view. It would only be erroneous so to regard this relation of subsidiary law as if in actual life, disputed jural relations were regularly determined

by territorial law, by the side of which the common law was only applied in exceptional cases. The practical application of common law has rather remained greatly preponderant so long as its contents remain in force and have not been entirely abolished where new codes have been introduced.

In great part of Europe the law-sources have, in modern times, been essentially changed by new indigenous codes. In Prussia and Austria reasons innate and relating to the state of law have given the impulse; in France inducements especially political have been added; partly the shattering of so many jural relations by the revolution—partly the necessity of bringing to oblivion in matters of law also, the differences of the provinces. The internal grounds operating upon all these legislators were the same which had already in many countries led to the production of a great number of special laws, namely the desire to remove the difficulties which had arisen partly out of the conflict of Roman and Germanic institutions of law, partly out of the clumsy theory and often shifting practice of the last centuries (S. 19. 20.) These aims could only have been attained by a preliminary purification of legal science from these faults by a searching critical examination; since this was wanting and therefore the composition of the codes was undertaken under the influence of the same faulty condition of science which it was desired to remedy, the improvement could only be an external, accidental and contracted one while the innate and essential faultiness became fixed and hence the purification by the innate power of legal science was prevented or at least rendered far more difficult.

The great difference between these codes and all previous single laws consists in their comprehensive

and excluding nature. They comprise an exhaustive, exclusive system of law. Although for example in the Prussian Landrecht the object was not the changing of the previous material law but an improved form, it lay in the very nature of the organically forming power of every theory of law that they should soon be unwillingly hurried beyond the aim which they had proposed and so arrived at results, which lay not in their original design and which, if at the beginning they had been able to foresee, would have led them to hesitate about the entire undertaking. By their excluding character these codes gave to the positive law of their countries an entirely new basis—new as to form inasmuch as within their territory there can no longer be any question of the immediate application of the Roman law—not new as to contents since the ideas and rules of law rooted in the earlier law-sources, survive in the new codes. Hence then a thorough insight into these codes is only attainable by a retracing of their contents to their origin, so that they have not rendered an exhaustive study of the earlier sources less indispensable, however often many may have flattered themselves with such a lightening of the juristic work.

In this, at the same time lies the reason for the selection of the modern Roman law as the object of the present work (S. 1.); since from this stand-point an immediate application is possible in the countries in which the earlier law-sources have remained dominant, as well as a thorough insight into the new codes wherever these have been introduced, this stand-point is most fruitful in vivifying juristic science and the practice dependent upon it.

SECTION XXII.

EXPRESSIONS OF THE ROMANS UPON THE LAW-SOURCES IN GENERAL. (a)

With this exposition of the nature of our law-sources, the expressions of the Romans upon the same object-matter must now be compared. The meaning, which we must attach to those expressions may be investigated after they have been collected. There are in the canon law and the laws of the empire, single matters belonging to this subject but so few, that they may be conveniently treated as an appendix to the expressions of the Roman law.

The enumeration of the law-sources, as it is found in numerous texts of the Roman jurists, is based upon no definite idea. They rather assume the form of an exhibition of the externals of law, without reference, to the nature and origin of its contents, and to classification which can only proceed from the relationship or diversity of the contents. As is quite consistent with their practical character, this enumeration assumes in them, the nature of indicating to the judge to what he must address himself in order to attain information upon any question of law. The frequently used division of law into *jus scriptum* and *non scriptum* suits very well this external mode of conceiving it(b)—a division to be treated as purely verbal and to which the Romans themselves moreover, have assigned no peculiar import-

(a) Puchta Gewohnheitsrecht Bk. 1. especially cap. 4. 5. 6.

(b) S. 3. 9. 10. J. de jure nat. (1. 2.) L. 6. S. 1. de jet J. (1. 1.) L. 2. S. 5. 12. de orig. jur. (1. 2.) The passage which most definitely excludes this artificial mode of thinking is Cicero de partit orst C. 37. "sed propria legis et ea *quæ scripta sunt* et ea quæ *sine litteris*, aut gentium jure aut majorum more retinentur."

ance. *Jus scriptum* therefore is the name of that law of which the origination is bound up with a written record.(c) Modern writers believed that they ought not to remain satisfied with this simple explanation but have often explained *jus scriptum* as law promulgated by a legislator and *non scriptum* as law not so promulgated, consequently applied the latter term to customary law and both terms without regard to the use or non-use of writing.(d) Others indeed allow both parties to be right, by distinguishing a juristic and grammatical use of the expression of which either may be employed at pleasure.(e)

Gaius thus sums up the law-sources: *Lex, Plebiscitum, Senatus consult,* imperial constitutions, Edicts,

(c) Thus the praetorian edict is jus scriptum even when it is based upon old customary law while this, by its reception into the edict has become in such a manner, recognized, certain, perhaps too changed, that one in reference to practice may regard it as newly arisen. The responsa of the jurists were equally jus scriptum, since they received their binding power through their being composed in writing. However a proposition of customary law did not become a part of jus scriptum because jurists admitted it into their systems of law and testified to its truth. This was merely the scientific imparting of the proposition of law without reference to its mode of origin. Conf. Thibaut S. 10. The explanation of Zimmern 1. S. 44. is not so much erroneous as too subtle and for that reason not suitable to the matter.

(d) Hübner's corrections and supplement to Höpfner.

(e) Glück 1. S. 82. Where will be found an excessively prolix treatment of the matter and a reference to the earlier writers. The occasion but by no means the excuse for the false opinion lies in L. 35. 36. de legibus (1. 3.) The true element of this error consists merely in the fact that the written law is externally recognizable in a fixed text whereby in comparison with customary law, its existence and contents preserve greater certainty; but the authority of the legislator is not wanted for that, since without being a legislator, the Praetor in his edict made written law.

responsa of the jurists.(f) Justinian's institutes make the like summary except that they add unwritten law wanting in Gaius.(g) Pomponius first gives a chronological view of the origination of law and then sums up its different grounds: *Lex, Prudentium interpretatio, legis actiones, Plebiscit,* Edicts, *Senatus consult,* imperial constitutions.(h) Papinian lastly agrees on the whole with Gaius except that he as well as Pomponius rather substitutes for the special *responsa* the more general *auctoritas prudentium.*(i) The difference between them all lies first in the arrangement of the parts; then in the fact that unwritten law is sometimes wanting and sometimes included; then in the different apprehension of the jurists' law; lastly in the fact that Pomponius only enumerates the *legis actiones.* This last discrepancy is easily explicable thus; in a view of the history of law, Pomponius might properly include matter which would not be suitable to a work upon the law actually prevailing.

Other summaries of the law-sources are found in the rhetorical writers. On this matter, as is explicable by the nature of the work, that contained in Cicero's Topics, most resembles the passages quoted from the jurists.(k) The rest of them are devoted to peculiar speculation upon the primal origination of the ideas of law.(l) Not only is this speculation very confused and

(f) Gaius 1. S. 2—7.

(g) S. 3—9. J. de j. nat. (1. 2.)

(h) L. 2. S. 12. de orig. jur. (1. 2.)

(i) L. 7. de J. et J. (1. 1.)

(k) Cicero top. C. 5. "ut si quis jus civile dicat id esse quod in legibus, senatus consultis, rebus judicatis, juris peritorum auctoritate, edictis magistratuum, more aequitate consistat."

(l) Cicero de invent 2. Cap. 22. 53. 54—de partit oratoria C. 37. Auct. ad Herennium 2. C. 13.

unsatisfactory but they content themselves, like the jurists above mentioned, with a conception of the outer appearance of law although this procedure was not consistent with their main object: indeed they push the confusion so far as to mingle with the law-sources the matter of fact grounds of origin of individual jural relations—a confusion from which indeed those jurists are entirely free.(m)

Two contrasts in the origination of law, to which a remarkable practical interest attaches, have been treated more carefully by the old jurists than those general summarizings of the law-sources—I mean the contrast between the *jus civile* and *honorarium*. The first of these opposites has the following signification.(n) The early commerce of the Romans with neighbouring foreign peoples made it necessary, to apply before the Roman tribunals the law of *peregrini* beside the indigenous law, therefore also to know it by study, and not merely the law of some particular foreign state but also that which was common to several of them. The more the Roman dominion spread and consequently the dealing with foreign states became more manifold, by so much must the scope of vision on this matter have widened and in this way they came to the abstract conception of a law common to the Romans and all

(m) Thus for example Cicero de part or C. 37. All law springs from natura or lex. This last is partly written, partly unwritten. Written arises either from acts of a public authority; lex, senatus consultum, foedus, or from private acts, tabulae, pactum conventum, stipulatio. Contracts again appear in the unwritten law. On this matter, the other passages cited are similar.

(n) Comp. Dirksen Eigenthümlichkeit des jus gentium Rhen. Mus. B. 1. S. 1. 50. Puchta Gewohnheitsrecht 1. S. 32—40.

foreign states, therefore common to them and all men. (o) This concept was the creation of experience and was so far incompletely verified as that the Romans could not be deceived as to the incompleteness of their induction, since in the first place they did not know all peoples, and next there was not a searching inquisition as to each proposition of the *jus gentium*, whether it also prevailed in all known states. Hence it was natural to refer to the ground of origin, with regard to this relative generality and this was generally found in the *naturalis ratio i. e.*, in the common consciousness of law implanted in the nature of men(p) of which the unchangeableness of this law was regarded as a necessary consequence. (q) However they were contented with generally recognizing this ground of origination without subjecting the individual positions of the *jus gentium* to an examination.

The very comparison between the indigenous and the general law resulted as follows. Single institutions with the rules of law referring to them were in fact always general therefore equally *juris gentium* and *juris civilis*. Under this head are most contracts in the intercourse of daily life, as buying, letting, partnership and moreover most delicts in so far as they bring with them the obligation to indemnification; then tradition as a mode of acquiring property which in

(o) "Omnes homines," "Omnes gentes," "gentes humanae." Gaius 1. S. 1. L. 9. L. 1. S. 4. de J. et J.

(p) Gaius 1. S. 1. 189. 2. S. 66. 69. 79. L. 9. de J. et J. (1. 1.) L. 1. pr. de adq. rer. dom. (41. 1.) In the writers upon rhetoric it is commonly called simply natura (note *l.*) The general root of this view has already been set forth above, at the end of S. 8.

(q) L. 11. de J et J. (1. 1.) S. 11. J. de. j. nat. (1. 2.)

application to *res nec mancipi* was also already recognized in the civil law; lastly the condition of slavery implanted by birth. Still more institutions however exclusively belonged to the indigenous law; thus marriage which even in its freest form was only binding between Roman citizens and hence was subject to entirely positive conditions; still more the paternal power and the agnation based upon it; the most numerous and important grounds of origin of property, as mancipation, usucapion and so on; moreover the *verborum* and *literarum obligatio* among obligations; delicts in as far as they involved a penalty of an amount arbitrarily determined; lastly the whole law of inheritance. Though thus belonging to indigenous law, most of these positive institutions have nevertheless a basis (kernel) of generality and by virtue of this essential generality therefore present themselves merely in another form in the foreign law also. Thus it happened through the increased commerce with foreigners that in the very Roman courts, beside many of those positive institutions, cognate ones of law in general, were recognized in practice; thus beside the civil, a valid, though less efficacious, marriage according to the *jus gentium;* beside agnation a *naturalis cognatio;* beside property *ex jure quiritium* that in *bonis;* beside the most binding form of the stipulation *(spondes spondeo)* forms attainable also by *peregrini.* This happened the least in the law of inheritance which for the most part has a strongly positive nature and there the permitted and constantly extended right of inheritance of cognates to an intestate, rests upon the developement of the same natural law. It is clear from this exposition that an opposition of national and general law *(jus civile* and *gentium)* can only be partially admitted, since a great

part of the first belongs also to the second(r); and even this partial opposition must in course of time diminish, since from the constant contact of the two systems in the courts of the same state, a real assimilation was unavoidable.

From these considerations the two appellations which are here used as completely synonymous are quite simply explicable: *jus gentium* the law which is found in all known nations: *jus naturale* the law which is produced by the common consciousness of law founded in human nature.(s) However of these two modes of expression the first must be treated as preponderant so that according to the view of the Romans the *jus gentium* was no less than the *jus civile*, an entirely positive, historically generated and developed law. In proportion as the Roman people ruling over many peoples, assimilating itself to them, withal lost its own individuality in this immense and undefined mass, must the *jus gentium* as more adapted to this new condition become as prevalent as it actually appears in the Justinianean legislation. This great alteration is to be regarded therefore as the work of an innate necessity, neither to be blamed as arbitrariness nor lauded as wisdom, except so far as it deserves the highest praise of rightly recognizing at that time the

(r) If one conceives the contrast from this stand-point it is related to, but not identical with, that of *jus strictum* and *aequitas*, jus (or juris ratio) and utilitas. Here is shown in special historical application what has been said above (S. 15.) of these contrasts treated generally.

(s) This terminology based upon a division of two members may be regarded as the prevalent one among the Roman jurists; sure enough beside it appears also a division of three members into jus naturale, gentium, civile. The first supplement to this volume treats of this matter,

gradual and silent operation of this necessity as was never before done and thus the text of the law has become more satisfactorily assimilated to its greatly altered spirit and nature than could have been reasonably expected in that century. The most important practical interest which was attached to this contrast, consisted in the application of the two systems of law being dependent upon the relation of the personal condition of the individual person. The special jural relations of the *jus civile* were merely applicable to Roman citizens, later, partially to the Latins, never at all to the *peregrini*. The relations of the *jus gentium* were applicable to all men who were not generally regarded as rightless. A similar difference of susceptibility for the application of the rules of law is also found in landed property because the institutions and rules of the law of things were applicable either in Italy only or also in the provinces and that accordingly as they belonged to the jus civile as *Mancipation and Usucapion* or to the *jus gentium* as *tradition*. One may now propose the question what relation does this contrast bear to that of written and unwritten law. Commonly this is only mentioned with respect to the *jus civile* so that it appears as a subdivision of that law, but in the nature of things there is no obvious ground for this limitation, and since the recognition of the *jus gentium* rests upon the continuous collection and assimilation of many foreign laws, therefore upon a procedure in which a written record is inconceivable although the written laws of foreign peoples may have been employed in it, the whole *jus gentium*, originally, *i. e.*, when it has not by accident been committed to writing in an edict, belongs in a Roman view to the unwritten law and forms a second division of it beside

the indigenous customary law, or in other words beside the *mores majorum.* This arrangement indeed is found in none of the jurists but it is in Cicero.(t) In conclusion the following relation between the two sorts of law here explained must be brought to view. Since the *jus gentium* in Rome had become a comprehensive system of law of a positive nature and practical application, the determinations of the *jus civile* must inevitably have had the capacity of acting upon it. If therefore anything whatever, *e. g.*, a marriage within a certain degree of relationship, was forbidden by the *jus civile,* such a marriage had never in Rome existence and efficacy even according to the *jus gentium* although perhaps such a prohibition did not exist among other nations so that among them the same marriage would have been valid.(u) In like manner it is quite evident that not even a *naturalis obligatio* arises out of a contract forbidden by the *jus civile—e. g.*, gambling debts or usury. Cicero in direct terms expresses this reaction of the *jus civile* upon the *jus gentium* in the following passage "atque etiam hoc imprimis ut *nostros mores legesque* tueamur quodammodo *naturali jure praescriptum est.* However this reaction, as is self-evident, can only be ascribed to such rules of the *jus civile* as bear in themselves the nature of an absolute law (S. 16.)

The second significant contrast was that of the *jus civile* and *honorarium.*(v) The practical importance of

(t) Cicero de partitione oratoria C. 37. See above (note *b.*)

(u) S. 12. J. de nupt. (I. 10.) comp. below S. 65. note *(b).* In such cases a two-fold treatment of the jus gentium is certainly shown: a speculative which merely regards the origin of the positions of law and a practical which relates to the form which it must have taken in the Roman courts.

(v) L. 7. pr. de J. et J. (1. 1.) L. 2. S. 10. de orig. jur. (1. 2.) S. 7. J. de j. nat. (1. 2.) Jus civile has also in general very different signi-

this did not at all consist in the fact that the latter was less operative and in cases of collision, for example, inferior for this ought not to be entirely admitted, but in the fact that its validity remained confined to the district and time of the jurisdiction of its author, instead of operating as every form belonging to the *jus civile* did in all parts of the empire and at all times.(w) In this sense it must be taken when very frequently this *jus civile* is also designated as *Lex* and *quod legis vicem obtinet*(x) and when the old jurists carefully remark of individual law-sources that this latter expression may be used of them.(y) However this purely

fications. It implies 1 Private law S. 1. 2 the positive of law of any state whatever. 3 especially that of the Romans S. 1. 2. 3. J. de j. nat. (1. 2.) L. 6. pr. L. 9. de J. et J. (1. 1.); 4 still more narrowly, the Roman law with the exclusion of the honorarium L. 7. de J. et J. (1. 1.); 5. still more narrowly that which bears no more special name L. 2. S. 5. 6. 8. 12. de orig. jur. (1. 2.)

(w) I do not say therefore that it operated everywhere but that it possessed the capacity of doing so. Thus *e. g.* the edictal laws of the emperors operated as a general rule over the whole empire; they might however through their contents be also confined to a single province or city. The responsa and originally the rescripts also operated only on the special matter, therefore in a very limited way but this limited operation of theirs had place in every part of the empire. The edict of a magisterial authority had by its very nature validity only within the limits of the district in which the author of the edict had jurisdiction.

(x) Gaius IV. S. 118. "Exceptiones .... omnes vel ex legibus, vel ex his quae legis vicem obtinent substantiam capiunt, vel ex jurisdictione Praetoris proditae sunt." L. 14. de condit. inst. (28. 7.) The very same thing that Gaius here says accidentally of the exception applies equally to the action.

(y) Have legis vicem 1. The senatus consults, Gaius 1. S. 4—2. The imperial constitutions, Gaius 1. S. 5. L. 1. pr. de const. (1. 4.) and even the imperiales contractus L. 26. C. de don. int. vir. 5. 16—3. The customary law L. 32. S. 1. L. 33. de leg. (1. 3.) "pro lege." L. 38. eod. "vim legis." L. 3. C. quæ sit longa consue. (8. 53.) "legis vicem" S. 9. J. de j. nat. (1. 2.) "legem imitantur."

practical difference had the following deeper ground. By decrees of the people, *senatus consults*, imperial constitutions, new law was in fact generated. The Praetor on the other hand did not express in his edict, that which he was not authorized to do, what should be law for the future but what he will regard and administer as law so that he merely announced beforehand his own official activity. Hence the former class of rules of law were expressed as valid *ipso jure*, the latter as valid *jurisdictione Praetoris*. This contrast will stand out still more clearly by a comparison with other contrasts already presented. That the *jus honorarium* belongs wholly to the written law, consequently the unwritten is attached solely to the *jus civile*, is self-evident. The relation of the *jus honorarium* to the *jus gentium* may appear more doubtful. It would be entirely false to hold the two to be identical since the edict of the *Praetor urbanus* in part contained much strict Roman law partly and not infrequently protected the *utilitas* deviating from the rules of the *naturalis ratio* (S. 15.)(z) Just as little however ought the contrast of the *jus civile* and *honorarium* be regarded as a subdivision of the *jus civile* in opposition to the *jus gentium*; for the provincial edicts contained in fact much *jus gentium* by the side of the purely particular law and this must have been still more prevalent in the edict of the *Praetor peregrinus*. The practical relationship of the two ideas can merely be asserted to be, that much of the general element embraced in the *jus gentium*, passed over into the *jus civile* of the Romans and that the *jus honorarium* served as the intermediate organ of this passage already

(z) Examples of such a conflict of the Edicts with the jus gentium are collected in Düroi Archiv. B. 6. S. 308. 309. 393.

remarked above. Lastly one may propose the still more general question whether the Praetorian law, so far as it embraced new law and especially so far as it modified the *jus civile*, was written or customary law. We may now assume it as clear that it derived its modifying power, from the customary law, not from the special power of the Praetor (S. 25. *(t)*) Nevertheless we should err if on that account we regarded the Praetor as a mere writer of customary law. The material was indeed given to him by people's law; however the cultivation of law proceeding therefrom by unfolding and applying it in particulars *(corrigendi juris civilis)* was more freely resigned to him, as also the enlarging of the civil law where it was incomplete *(supplendi juris civilis.)(aa)* In fact therefore the developement of law was in great measure cared for by the Praetor; however through the annual change of the Praetors the mode of accomplishment of the task again became somewhat popular although with an aristocratic character.

All that has hitherto been said of the general view of the Romans upon the law-sources can only hold good if the time in which legal science still had a life of its own. After this time therefore from that of the Christian emperors the view became fundamentally changed. Then merely *leges* and *jus* existed as law-sources, that is to say the imperial edicts and the law worked up in

(*aa*) The apparent contradiction, of such texts as refer the materials of the edicts to customary law with others which set the edict in opposition to customary law as Gaius 3. S. 82. neque lege 12. tab. "neque praetoris edicto, sed eo jure quod consensu receptum est," and S. 3—9. J. de j. nat. (1. 2.), is removed by the observation that in texts of this latter kind, that only is designated as customary law which continued in its original form and had not been incorporated into the edict.

science (S. 15. (a)) into which form all earlier law had already resolved itself. Valentinian III reduced this use of the literature in the Courts to rigid rules (S. 26.) Still more simple were the law-sources by Justinian's legislation. He gave the sanction of written law to a part of the existing jurisprudential literature, invalidated the remaining and far greater part and forbade the future origination of a new (S. 26.) Since therefore the digest no longer prevailed as *jus* but as *lex*, one might say that, merely with the addition of a particular customary law of which the scanty form will immediately be spoken of more at length, there existed no longer any other law-sources than the imperial constitutions. The general contrasts of *jus civile* and *gentium* were merely to be mentioned as history in Justinian's legislation, as was in truth the case there, since they had entirely lost their practical importance, even if not all practical application. Then it was still the rule that Roman citizens alone could contract a perfectly valid marriage, obtain the paternal power, make a testament, and be instituted as heirs. However in fact the *peregrini*, to whom this part of legal capacity continued to be denied, were merely foreigners therefore for the stand-point of the Romans and for the Roman tribunals, then insignificant: and even for these the greater part of the practical distinction was removed in consequence of the right of succession to an intestate, since the 118th Novel no longer depending upon agnation. For a long time no more *jus honorarium* had arisen and there could hence no longer be any question as to the geographical limits of its applicability.

SECTION XXIII.

EXPRESSIONS OF THE ROMANS UPON WRITTEN LAWS.

Sources: Dig. I. 3. 4.
Cod. Just. I. 14. 15. 19. 22. 23.
Cod. Theod. I. 1. 2. 3.

What is preserved to us in the law-sources upon the old forms of legislation is of very scanty aspect. There are merely common-places, instructions for the conduct of the legislator from which there is little to learn. (a) Doubtless instructive accounts of the position of each kind of decrees of the people as well as of the law-giving power of the Senate were found in the old jurists; these however bore too slender a reference to the age of Justinian to permit us to expect that they would be admitted into his collections. (b)

More important and connected are the notices and rules as to the imperial legislation; these were still applicable in Justinian's empire and a partial applicability to our own condition is at least conceivable. Gaius and Ulpian agree in saying that all *constitutiones* had *legis vicem* since each Emperor held his *imperium* by a law (c); and they reckon three sorts, Edicts, Decrees and Rescripts to which we must still add the Mandates.

I. *Edicts.* Not merely their name but also the authority to make them attached immediately to

(a) L. 3—6. 8. 10—12. de leg. (1. 3.)

(b) The few and mutilated expressions of Ulpian tit de leg. S. 3. support this conjecture. Conf. Blume Zeitschrift. f. geschichtl, Rechtsviss. 4. 367.

(c) Gaius I. S. 5—L. 1. de const. princ. (1. 4.) from Ulpian copied from there S. 6. J. de j. nat. (1. 2.) The enquiry how in the Digest and Institutes the lex regia has received a meaning other than its original one belongs not to this place. Ordinarily *constitutio* denotes the whole class, at times only the Edicts in contrast to the rescripts L. 3. C. si. minor. (2. 43.)

the States-law of the republic. They were orders which the emperor, by virtue of a magisterial power appertaining to him, promulgated, just as the Praetors, Pro-consuls, &c. before, and even for a long period during the time of the emperors, also did. That this form was not from the beginning applied to the most important acts of the supreme power is explained at once by the long continued effort of the emperors to rule with the old accustomed forms and also by the fact that so long as this form was firmly restrained within the traditional limits, it was not altogether adapted for general legislation; because when the Emperor promulgated an edict in his *tribunicia* or *proconsularis potestas*, the first availed, like the tribunitial power itself, in Rome only; the second only in the provinces and in truth only in those which had fallen to the share of the Emperor. Only after the idea of the Emperor as the sovereign *magistratus* for the whole empire, was developed and recognized could his edicts be regarded as laws of the empire and it is therefore very remarkable that Gaius already ascribes to them *legis vicem*, therefore pronounces them to be independent of any local limits of jurisdiction instead of having as their fundamental character a limitation to a certain district like other edicts which are hence sharply divided from the *lex et quod legis vicem obtinet* (S. 22.) Although not a few certainly imperial edicts are found in the first century, I however regard as certainly so, those only introduced with this appellation in the law-sources since an equally firm regard to technical phraseology is not to be expected in the historical writers.(*d*)

(*d*) I will here give a summary of edicts proper which doubtless may be much enlarged. Four of Augustus L. 2. pr. ad Sc. Vell. (16. 1.) L. 26. de lib. (28. 2.) L. 8. pr. de quaest (48. 18.) Auct. de j.

Now since the edicts as real *statutes* ought to have a generally obligatory force, in contradistinction to other constitutions, it was therefore important to have certain characteristics of them. These were thus stated in an edict of Theodosius II and Valentinian III;— the name *edictum* or *generalis* constitutio; the communication of it to the senate by an *oratio*; the publication of it by the governors of provinces; lastly the provision inserted in the constitution itself that it should have a force obligatory upon all; either of these marks ought alone and without the rest to be sufficient.(*e*) This property would not consequently be excluded, by a single case being the occasion of it, as this is expressed by the constitution quoted and as little by the circumstance that the contents were not addressed to all Romans but to a single class(*f*) since these precepts ought to be recognized and respected by

fisci. S. 8. Claudius four. L. 2. pr. ad Sc. Vell. (16. 1.) L. 15. pr. ad L. corn. de falsis (48. 10.) L. 2. qui sine man. (40. 8.) L. un S. 3. C. de lat. lib. (7. 6.) Ulpian 3. S. 6. Vespasian two. L. 4. S. 6. de legat. (50. 7.) L. 2. C. de aed. priv. 8. 10. Domitian L. 2. S. 1. de cust. (48. 3.) Nerva. L. 4. pr. ne de statu (40. 15.) Trajan four. L. 6. S. 1. de extr. crim. (47. 11.) Gaius 3. S. 172. S. 4. J. de succ. lib. (3. 7.) L. 13. pr. S. 1. de j. fisci (49. 14.) Auct. de j. fisci. S. 6. Hadrian two. Gaius. 1. S. 55. 93. L. 3. C. de ed. D. Hadr. (6. 33.) Pius L. 11. de muner. (50. 4.) Marcus three S. 14. J. de usuc. (2. 6.) L. 24. S. 1. de reb. Auct. jud. (42. 5.) L. 3. C. si adv. fiscum. (2. 37.) Severus. L. 3. S. 4. de sep. viol. (47. 12.) Besides proclamations to the people in which no legal propositions are contained appear as edicts *e. g.* that of Nerva in Plinius epist. X 66.

(*e*) L. 3. C. de leg. (1. 14.)

(*f*) What our jurists call a jus singulare. Thus *e. g.* the edicts of Augustus and Claudius relative to the acceptance of women as bail, an edict of Augustus forbade the disinheritance of soldiers. L. 2. pr. ad Sc. Vell. (16. 1.) L. 26. de lib. (28. 2.) There were therefore according to later phraseology generales leges. Güyet is mistaken on this matter. Abhandlungen S. 42.

all; lastly not by its being addressed to a single tribunal of which the question was perhaps the occasion of the law.(g) Moreover the same Emperors explained how for the future their edicts would be composed under the co-operation of the senate by which they certainly did not mean to say that the force of law was dependent upon the observance of this form. Lastly the necessity of making known the law is recognized however without the definition of a form for doing so which in that matter can alone be of practical value.(i)

II *Decreta.* By these is understood each exercise of the imperial jurisdiction as well by interlocutory orders as by final judgments.(k) When as to all other constitutions the force of law in the individual case is ascribed to these, this appears inconsistent, since they ought rather to be regarded as judicial determinations, which were always of legal force since they proceeded from the supreme court of the empire. This mode of conceiving the matter is perhaps explicable by the whole jurisdiction of the Emperor being an extraordinary one to which the old idea of *judicium* and *res judicata* was not absolutely suitable, it was therefore wished

(g) By far the most numerous imperial laws namely those of Justinian are addressed to some functionary *e. g.* Praefectus praetorio and they may on account of this shape be also called Rescripts; however no one doubts that they are real *edicta, generales leges, leges edictales* and hence the expression, *rescriptum* in itself applicable, was not usual. A comparison with modern contrivances will render this clearer. What is published in the Prussian Gazette be it called law or ordinance has a completely similar legislative power therefore whether it is addressed to all subjects, and functionaries or consists in an order of the cabinet addressed to the ministry in general or to a single minister.

(i) L. 9. C. de leg. (1. 14.)

(k) L. 1. S. 1. de const. princ. (1. 4.) "Quodcunque igitur Imp. .... vel *cognoscens* decrevit vel *de plano interlocutus est* ... legem esse constat.

to express quite decidedly that the decisions of the Emperor were not less, but even more competent, than those of a *judex*, to establish unalterably a disputed jural relation. In fact there was sure enough no essential difference from the legally valid decision of a judge, since in this case also the operation would be confined to the case presented for decision and the very rule contained in the decision ought not to be applied, as legally established, to other cases. Indeed a great weight of authority could not be denied to the rule applied in a decree and hence is explained why the jurists compiled collections of such decrees(*l*) and why single decrees gave occasion to the formation and recognition of entirely new legal positions.(*m*)

As to this limited operation of the decrees, Justinian so far as interlocutory ones are concerned, left the matter in the same state, for in the Code there is an earlier constitution introduced which expressly prescribes this as to interlocutory ones.(*n*) On the other hand he ascribed to the final imperial decrees a more extended operation, so that the rule of law expressed in them was also to be applied in all future cases.(*o*) From the

(*l*) Pauli libri tres decretorum. Further the collection by Dositheus of the decrees of Hadrian.

(*m*) *e. g.* The decretum D. Marci upon remedies by one's own act L. 13. quod metus (4. 2.) L. 7. ad. L. J. de vi priv. (48. 7.)

(*n*) L. 3 C. de leg. (1. 14.) " .... interlocutionibus, quas in uno negotio judicantes protulimus vel postea proferemus, *non in commune prae judicantibus*" in contrast to the legal force before defined to belong to the edicts.

(*o*) L. 12. pr. C. de leg. (1. 14.) "Si imperialis majestas causam cognitionaliter examinaverit, *et partibus cominus constitutis sententiam dixerit;* omnes omnino judices ... sciant hanc esse legem non solum illi causæ pro qua producta est *sed et omnibus similibus.* A contradic-

very insertion of this provision it follows that up to that time another rule prevailed on the matter and that something new must have been introduced by it. When therefore the Emperor appeals to the concordant opinion of the old jurists upon the matter he thus gives to their words an arbitrary meaning since they certainly thought only of the legal force of decrees as to the single case.(p) In fact however much may be said for the innovation and it was at least free from the objections which stood in the way of a similar handling of the rescripts. Then an error of the Emperor from a one-sided report was not possible in this case in which both sides had been heard and the dignity and publicity attached to the imperial court(q) in some measure made up for the want of open publication. Before Justinian therefore all decrees had legal force only in the existing case; by his new enactment a more extensive operation was assigned to the final decisions, so that the rule of law contained in them should be regarded as a general written law.

The nature of this contrast has been greatly misunderstood by the modern jurists. They have first of all confounded it with the limitation of the legal validity to the parties to the suit. The legal validity refers only to the particular jural relation and this

tion is generally believed to exist between this passage and that in the foregoing note: but the two sorts of decrees are expressly distinguished here as Ulpian distinguishes them (note *k*.)

(p) L. 12. cit. ... "cum et veteris juris conditores, constitutiones qua ex imperiali decreto processerunt, legis vim obtinere, aperte diluciqueque definiant: It seems as if Gaius 1. S. 5. was here directly referred to.

(q) Decrees of this kind may be compared to the decisions of our superior courts of appeal.

should not be extended even here; therefore if the Emperor had to decide on a matter of inheritance between two parties, even this decision of the Supreme Court should neither injure nor profit a third. Secondly they have confounded it with that of a rigid and liberal interpretation. There is no question of that here but much rather of the permissibility or non-permissibility of the application of the same rule of law not extended, to a future and precisely similar case.

SECTION XXIV.

EXPRESSIONS OF THE ROMANS UPON WRITTEN LAWS.—*(Continuation.)*

III. *Rescripts.*(a) *Rescriptum* means literally a re-writing, a written reply. This might, with respect to external form, be issued in various ways: merely on the margin of the letter received *(adnotatio subscriptio)*, in a separate letter *(epistola)*, lastly in a solemn dispatch *(pragmatica sanctio)*(b) of which we do not accurately know the official form. To all these rescripts the validity of a *lex* is ascribed, although essentially different, through more contracted limit, from the validity of the edicts. What now is to be understood by this? In order that this peculiar nature of a contracted validity should belong to them, we must necessarily add something in thought, which is not embraced in the idea determined by their form and occasion.

(a) Schulting diss. pro rescriptis Imp. Rom. Commacad. Vol. I. n. 3. Güyet Abhandlungen. n. 4.

(b) This form would only have been specially used on more important occasions viz., merely in rescripts on matters of public law and indeed in reference to corporations L. 7. C. de div. rescr. (1. 23.) That however this limitation was not universally observed, is very clearly

There exist therefore letters of the Emperor which have still smaller force and do not therefore at all operate as a *lex*—others, freed from those narrow limits, which operate more forcibly; we must subtract both and here the question can only be of the remainder lying between the two; these only can be considered by us as Rescripts in a technical sense. Thus in the first place all letters of an unofficial character, which besides every one would tacitly in thought remove from the class, although their name and form do not exclude them, have less power than rescripts proper. However from the official letters which we may designate as enactments, we must separate those which were not at all intended to apply a rule but to be a mere exercise of the will of the Emperor as *e. g.* exceptions of individuals from the application of laws (S. 16.), pecuniary aids, rebukes.(c) These have in their operation certainly the same power as a *lex* as to the person and the case giving occasion to them, and each judge has to respect them as laws. On the other hand they cannot as a positive authority supply a rule for the treatment of other cases since they themselves rest originally upon no rule.

On the other hand those letters, which prescribe a rule as such to be generally obeyed and with that

shown by Const. Summa S. 4. "Si.. pragmaticae sanctiones ... alicui personae impertitae sunt. Very copious material for this enquiry are found in J. H. Böhmer exerc ad Pand. 1. ex. 12 C. 1. He however errs in treating that legal limitation of the application of the pragm. sanct. as the concept itself.

(c) They are called personales constitutiones L. 1. S. 2. de const. (1. 4.) S. 6. J. de j. nat. (1. 2.) Modern writers call them rescripts of grace which is too narrow and *e. g.* certainly does not suit reprimand and punishment.

view were generally promulgated have more force than rescripts proper. These are actual written laws of unlimited validity as to which certainly no distinction from other laws can be based on the form of a letter being accidentally selected or on the fact of their being called forth by a question or exposition, in reply to which they gave the law. In an earlier time these from their external form were called general letters or general rescripts(d) without any intention of signifying thereby a narrowed validity. When however this form of legislation at a later time became the prevailing one, they no longer applied this name to them, but embraced them under the general name *leges, edicta, edictales constitutiones.*(e) The making them generally known, which is not apparent from the shape in which we know them was a matter of course there and was

(d) L. 1. S. 2. de fugit (11. 4.) "*Est etiam generalis epistola* D. Marci et Commodi quæ declaratur, et praesides et magistratus, et milites stationarios dominum adjuvare debere in inquirendis fugitivis &c. L. 3. S. 5. de sepulcro viol. (47. 12.) "D. Hadrianus rescripto poenam statuit quadraginta aureorum in eos qui in civitate sepeliunt, quam fisco inferri jussit, et in magistratus eadem qui passi sunt ... *quia generalia sunt rescripta* et oportet imperialia statuta suam vim obtinere et in omni loco valere." Perhaps the epistola D. Hadriani upon giving security belongs to this place. In the two first named cases the matter was fitted for this treatment by its being of a police nature. Such rescripts were, like what we call circular rescripts, addressed to several functionaries at the same time.

(e) Thus *e. g.* Justinian in L. 5. pr. C. de receptis (2. 56.) calls his own earlier enactment (L. 4. eod) a lex although it was a communication to the Praefectus praetorio; still more decisive on this matter is the Theodosian code which consists mainly of such rescripts and of which the parts are designated by the author himself as "constitutiones edictorum viribus aut sacra generalitate subnixae" and "edictales generalesque constitutiones." L. 56. C. Th. de const. (1. 1.) ed Hänel. Güyet on this matter errs; he allows himself to be misled by the outer form in numbering these among the rescripts and in putting the edicts in opposition to them whence he then derives results as to the true edicts. comp. above S. 23. note (*g.*)

managed, by the functionaries to whom they were addressed, according to general directions without any necessity for a special direction in each particular case; however sometimes such an injunction is expressed in the ordinance itself.(*f*) In like manner the *pragmaticae sanctiones* might be real laws(*g*) so that to them as to the less formal *epistolae* something must always be added in thought if they are to fall into the province of the rescripts proper, narrowed in their validity.

What is it then which characterizes the rescripts proper and broadly separates them from the edicts? It is their destination for merely operating upon a single case with which is naturally connected the want of any public promulgation. On the other hand they have in common with other constitutions that they rest upon a rule and express this rule merely however with a view to the concrete application of it. Moreover the following important differences are presented in them.

1. They will sometimes be occasioned by the demand of a single party (*libellus*), sometimes by that of a court.(*h*) This last happens especially in the important application to a procedure of a particular shape where a judge begs the Emperor to prescribe to him the decision to be given, *(relatio consultatio.)* Here the Emperor appears not actually as a judge but as the framer of the decision for another judge, exactly as our faculties of jurists in cases submitted to them. Hence such an order is numbered among the rescripts

(*f*) *e. g.* in L. un C. de grege domin. (11. 75.) Other passages are collected by Güyet S. 74.

(*g*) Thus *e. g.* Justinian's sanctio pragmatica pro petitione Vigili upon the regulation of Italy after the completion of the conquest.

(*h*) L. 7. pr. C. de div. rescr.

not among the decrees. Justinian has forbidden these consultations but this must not be understood absolutely as it might appear according to the words.(*i*)

2. The rule contained in them is sometimes interwoven with the individual decision sometimes separately expressed and then employed as ground of the decision, so that it may have been brought forward in the same shape as a law, but it was not one. Such rescripts are called *generalia rescripta* in a sense other than that in which the expression has been presented above.(*k*)

3. The rule employed by them is often fully embodied in the previous law so that the Emperor acts in the same way as an answering jurist; often however the previous law is developed in the rescript by a free interpretation. This happens especially where political or politico-economical considerations determine the new rule and where no right of another person is endangered by it.(*l*)

(*i*) On the constitutions comp. especially Hollweg Civil Prozess 1. S. 10. The abolition of them is contained in the Nov. 125. That this prohibition could not have prevailed absolutely will be first shown in the theory of the interpretation of laws (S. 48.) Besides it is self-evident that when despite the prohibition a judge asked the question and the Emperor made up his mind upon an answer, the judge was as much bound as before the 125 Nov. In like manner when the Emperor of his own motion or at the request of a party addressed a rescript to the judge. The application of rescripts to a particular case was therefore now much limited, by no means entirely abolished.

(*k*) L. 89. S. 1. ad. L. Falc. (35. 2.) "generaliter rescripserunt." L. 1. S. 3. de leg. tut (26. 4.) "generaliter rescripsit." L. 9. S. 2. de her. inst. (28. 5.) "rescripta generalia." L. 9. S. 5. de jur. et facti. ign. (22. 6.) "initium constitutionis generale est." The rescripts quoted in these texts refer to single cases and are hence distinguished from the general rescripts quoted in note (d.) On the other hand the expression generale rescriptum must denote more than a mere antithesis to personalis constitutio.

(*l*) These two considerations at once explain why the doctrine of

The operation of the rescripts may be summed up in the following rules. (1) They ought to have legal force for the single case by which they were occasioned. (2) They should not have it for any other case. (3) On the other hand they also operated upon other cases with the force of a great authority.

The legal force for the single case follows from its being generally ascribed to them in the Digest and the Institutes (S. 23.); in the Code moreover it is denied as to every case other than that by which it was occasioned so that the applicability of the force of law remains merely for the single case. The meaning here is that every judge before whom the rescript is produced is bound to a strict conformity with it, and is not allowed to give any scope to his own convictions. This great effect was particularly important when the rescripts had been elicited not by a judge but by a party; here they appear as a right acquired by a person which could be rendered available also to his heirs and co-parties and available after a longer lapse of time.(m) However in this case the rescripts were also peculiarly dangerous both because of their possible falsification and still more commonly because they might have been obtained through a one-sided setting forth of the matters of fact. Security against falsification was sought in precise directions upon the form and distinguishing marks of the rescripts.(n) By reason of the wrongful exposition

excuses especially was so often extended by mere rescripts. Fragm. Vatic S. 191. 208. 247. S. 159. 206. 211. 215. 246. Especially worthy of remark is S. 236. in which the intention of innovating is directly expressed; "quo rescripto declaratur ante eos non habuisse immunitatem."

(m) L. 4. 12. (otherwise 2 and 10 c. th. de div. rescr. (1. 2.) L. 1. 2. c. de div. rescr. (1. 23.)

(n) L. 3. 4. 6. c. de div. rescr. (1. 23.) L. 1. c. th. eod. (1. 2.)

of the facts it was constantly permitted to the opposite party to take advantage of a particular procedure.(o) With this also was connected the provision that every rescript which was contrary to the interest of the state or to recognized rules *(contra jus)*(p) should be regarded as invalid. By this latter determination the Emperors in no way intended to disclaim the developing of law by their rescripts; here the thought was rather of that sort of rescripts in which the Emperors might be misled by an untrue statement of the case into violating the existing rules of law. If one reflected upon these risks attached to the legal force of the rescripts, one might certainly have considered it more judicious at least on the demand of the parties to issue no rescripts whatever in law suits, as Trajan is reputed to have thought; it was by this consideration also that Justinian was at last moved to forbid the judges to regard private rescripts and consequently to take away from them entirely the force of law.(q)

On the other hand the force of law was repeatedly and in the most express terms denied to rescripts for cases other than that for which they were issued. This happened in special application to the rescripts occasioned by the *consultationes* of the judges(r) as to which

(o) L. 7. c. de div. rescr. (1. 23.) L. 2. 3. 4. 5. c. si contra jus. (1. 22.) To this is related the appeal permitted against rescripts that is to say against the decisions based upon them L. 1. S. 1. de appell. (49. 1.)

(p) L. 2. (otherwise 1.) cod. th. de div. rescr. (1. 2.) L. 6. c. si. contra jus. (1. 22.) L. 3. 7. c. de precibus (1. 19.) Nov. 82. c. 13.

(q) Capitolini Macrinus c. 13. "quum Trajanus nunquam libellis responderit." He would therefore issue rescripts merely to the Courts not to the parties. Several rescripts of Trajan are collected by Schulting diss. pro rescriptis S. 15. Justinian has forbidden the regarding of private rescripts in the Nov. 113. c. 1. of the year 541.

(r) L. 11. (otherwise 9.) c. th. de div. rescr. (1. 2.) L. 2. c. de leg.

such a wider operation might have been the least hazardous; the same limitation as to private rescripts resulted so completely of course that it did not appear necessary specially to express it. This limitation was based first on the fact that from the regard to the particular case and especially to the wholly untrue representation of the parties the very rule expressed might easily have so one-sided a shape that its general application must become very dangerous; to this was added the still more important ground that the rescripts were wanting

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(1. 14.) "Quae ex relationibus .... vel consultatione .... statuimus .... nec generalia jura sint, sed leges faciant his duntaxat negotiis atque personis, pro quibus fuerint promulgata." L. 13. c. de sentent. et interloc. (7. 45.) "Nemo judex vel arbiter existimet, neque consultationes, quas non rite judicatas esse putaverit, sequendum ... cum non exemplis sed legibus judicandum sit." This last passage is peculiarly important in two respects first because in the words quoted he speaks directly of the application of a rule once accepted to new cases of the like kind—the matter of which we are speaking. Secondly because it puts together with the consultationes, that is to say with the rescripts occasioned by them, the decisions of several high tribunals not however those of the Emperor's own. By this omission all contradiction of the text to L. 12. c. de leg. (1. 14,) (S. 23. note *o*) is with much foresight avoided. A distinction therefore is made between the decisions of the Emperor himself upon a case conducted before him and the decisions of the judge of which a rescript of the Emperor was merely the foundation. These latter decisions had neither like publicity nor like certainty with the former, since a misunderstanding in them as to the meaning of the rescript was always conceivable. Many would by way of exception ascribe a general force to the rescripts when they contained an authentic interpretation since L. 12. S. 1. c. says "interpretationem, sive in precibus, sive in judiciis sive alio quocunque modo factum ratam et indubitatam haberi." Glück 1. S. 96. n. 3.; but the rescripts were valid just as much as laws but limited to the individual case. Had Justinian intended to ascribe to them a general validity in contradiction with the other passages quoted he would not have expressed it by the words sive in precibus used in passing but would have as expressly said it, as he had actually done, immediately before, of decrees.

in public notification. This reason is as applicable to the interpreting rescripts as to all the others and it is wrong when, as is done by many, a binding force in all cases is ascribed to them—a point which can only be rendered quite clear hereafter (S. 47.) As to the rescripts, as well as the decrees (S. 23.) this limitation has often been misunderstood in modern times. Here also it has been confounded with the prohibition of an extending interpretation, while there the question was as to the application of the rescripts themselves to new cases of a completely similar kind, and not at all of the application of an extended rule. As to rescripts also the limitation has been confounded with the rule that a decision having the force of law avails only between the parties to it. That rule was still less in question here than as to decrees; there could indeed be no question about it when *e. g.* the testamentary heir submitted to the Emperor a testament of doubtful validity and the Emperor by rescript recognized the validity, the heir by testament could make use of it against each heir to the succession of an intestate (the next of kin), because it was not at all necessary for a definite opponent to be named in the petition. However the force of law in other cases was meant to be withdrawn from rescripts, not the influence, which as a great authority, they might have upon them.(s) It was impossible to forbid this—

(s) Many seem to understand the legis vis which Gaius and Ulpian ascribe to the rescripts solely of this influence as authority but certainly wrongly. Those jurists knew better how to choose their expressions than people here give them credit for. If they meant anything so indefinite as influence and operation generally Gaius would not have left out the legis vis as to the jus honorarium: in like manner in S. 7. he would not have named merely the responsa prudentum but the still more extensively operating auctoritas prudentium. It would however be erring on the other side so to understand the indefinite expres-

more it might not appear at all desirable to do so. Indeed in that influence existed an especial means of developing law, and in the Digest we have before our eyes the extensive use which the ancient jurists have made of this means. There was no danger of much consequence from bad rescripts since the character of bare authority in no way excluded individual rescripts from criticism and rejection. However by reason of this danger the Emperor Macrinus seems once to have thought of abolishing all the old rescripts—a thought which manifestly referred merely to this authority.(t)

From this point of view all the appearances which we find of the rescripts are easily explained. It is explained that the jurists might have a very extensive knowledge of them since they themselves, lived in proximity to the Emperor, often conducted the compilation of the rescripts, still oftener might have free access to the archives.(u) It is explicable also that they should

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sion of Gaius (1. S. 5.) as if he would ascribe to the rescripts just as generally binding a power as to the edicts of the emperor. Just as he apparently ascribes "legis vicem" in the S. 7. to the responsa, it appears incidentally only from the following contrast that he must be speaking only of the legally binding power upon the judge of the individual case.

(t) Capitolini Macrinus c. 13. Fuit in jure non incallidus, a deo ut statuisset omnia rescripta veterum principum tollere, ut jure non rescriptis ageretur, nefas esse dicens leges videri Commodi et Caracalli et hominum imperitorum voluntates quum Trajanus nunquam libellis responderet, ne ad alias causas facta praeferrentur, quae ad gratiam composita viderentur. This intention of the emperor could only act upon the authority of the rescripts in future, since the cases in which the veteres principes had given the rescripts, had long been settled and forgotten.

(u) It is not therefore necessary by reason of this very customary acquaintance with the rescripts to suppose as is done by Güyet (ut sup. S. 74.) a public proclamation.

early have made known collections of rescripts in the form of books. (v) It is also explicable however that they should have taught the opposite of what was found in a rescript, either because by accident they did not know of it or because they rejected its contents as erroneous. (w)

From this summary view of the precepts given at different times as to the rescripts it follows, that at the time of Justinian's law books they were still of the greatest importance, that however their influence has been almost entirely annihilated by the legislation of the novels.

IV. *Mandates.* These were instructions to functionaries who had to apply them in the exercise of their offices. As a rule such were addressed to the legates who in the imperial provinces acted as representatives of the Emperor, just as the ordinary pro-consuls might issue mandates (where *e. g.* the *mandata jurisdictio* exists.) Such mandates had the same regard in the province as the provincial edicts. That they are mentioned much more rarely than other sorts of constitutions, is fully explained by the dependent situations of the provinces in relation to the whole empire and by its being

(v) Thus *e. g.* Papirii Justi libri XX. constitutionum which according to the fragments preserved were rescripts. The Gregorian and Hermogenian code was so at least in great part. Further without doubt the Semestria of D. Marcus, half yearly collections of a selection of the most important rescripts often of decrees also belonged to this class—these were called forth often by private persons often by the Emperor himself in which case this might have availed as a sort of legal publication. Comp. upon this Brissonius *v.* Semestria. Cujacius in Papin L. 72. de cond. opp. IV. 489. His explanation I do not consider correct.

(w) Passages of such a kind are collected by Güyet ut. sup. S. 55. foll.

seldom possible for the developement of the general Roman law to have its beginning in them. Most of the mandates of which we have accounts relate to criminal law or police orders.(x) A more remarkable case, in which they have led to a new proposition of private law, concerns military testaments(y) but this is easily explained by the nature of the object-matter for a campaign, which is presupposed in such a testament, could only happen in the provinces and hence also a campaign was essential in such province to bring this proposition of law into use. In like manner the interdicting of marriage between Roman provincial functionaries and the women of their province was based upon mandates.(z) Gaius and Ulpian pass over the mandates in the enumeration of the sorts of constitutions: this may arise from the small importance mentioned; possibly from the circumstance that in the beginning they were limited to single provinces so that the *legis vis* attaching to the rest of the *constitutiones* could be ascribed to them as little as to the *jus honorarium.*

The result of this enquiry as to the operativeness of the imperial constitutions may be summed up in the following propositions. The edicts and mandates were laws proper equally obligatory upon the judge and the parties; the mandates naturally merely in the province for which they were issued. The rescripts had the force of law only in the single case for which they were issued; after Justinian's latest direction even in this case they were much limited inasmuch as those issued

(x) Brissonius de formulis Lib. 3. c. 84.

(y) L. 1. pr. de test mil. 29. 1. "et exinde mandatis inseri coepit caput tale: cum in notitiam, &c.

(z) L. 2. S. 1. de his quae ut. ind. (31. 9.) L. 6. c. de nupt. (5. 4.)

to private persons were to remain unnoticed and as it was as a rule forbidden to the judge to seek for rescripts except in the case of a doubt as to the interpretation of a law. Decrees were for the individual case like decisions of legal validity and in so far as they embraced final decisions and not mere interlocutory orders, the rule of law expressed in them had general validity like a real written law. Moreover all the sorts of constitutions, without regard to their differences and limitations, had everywhere the natural power of a great authority for each person who had happened to obtain a knowledge of them.

Justinian's code made a great inroad upon all these sorts of imperial constitutions. What was received into the code received the force of law even when as a decree or rescript, it had hitherto not had any such force of law for a future case: the unreceived were by the very non-reception abolished as laws.(*aa*) The rules here laid down therefore could henceforth be applied only to these constitutions which after the promulgation of the code, were issued by Justinian or his successors.

The edicts or *generales formae* of the *Praefecti Praetorio* might be regarded as an appendix to or partial substitute for the imperial legislation. Alexander Severus gave to them a generally binding force if they did not contradict the written laws and so long as the Emperor did not order otherwise(*bb*) Justinian appeals to single

(*aa*) Const. Summa S. 3. Hereby however the privileges conferred by rescripts upon any corporation or a private individual were not meant to be abolished. Ibid. S. 4.

(*bb*) L. 2. c. de off. praef. praet. or et Ill. (1. 26.) That was then to be understood of the whole empire, since Constantine of each praefecture in particular as previously of the provincial edicts of the pro-consuls.

ones among them as to written laws.(cc) Single fragments of such are preserved at the end of our collection of novels.(dd) Cassiodorus ascribes to the praefects a similar legislative power.(ee)

SECTION XXV.

EXPRESSIONS OF THE ROMANS UPON CUSTOMARY LAW.

Sources: Dig. 1. 3.
Cod. VIII. 53.
Cod. Th. V. 12.

The following remarkable utterance upon customary law is found in Cicero in the midst of rather confused thoughts. "A rule of life, says he, is given by it which does not spring from the opinion of individuals, but from a necessity dwelling in our moral nature. In the communion of men living together, where it merely appears as an undefined directing influence this rule is in part brought to a definite shape, partly widened, partly established as unchanging usage." Subsequently he puts the *lex* or the positive rule arbitrarily formed(a) in contradistinction to all this. Among the old jurists we do not find customary law recognized to the extent

(cc) L. 16. c. de jud. (3. 1.) L. 27 c. de fidejuss. (8. 41.)

(dd) Nov. 165. 166. 167. 168. Comp. Viener Geschichte der Novellen S. 98. 118.

(ee) Cassidor. Var. VI. 3. Formula Praef. Praet. "Pene est ut leges possit condere."

(a) Cicero de inventione II. 53. 54. "Natura jus est, quod non opinio genuit, sed quaedam innata vis inseruit, ut religionem, pietatem. .... Consuetudine jus est, quod aut leviter a natura tractum aluit et majus fecit usus, ut religionem: aut si quid eorum, quae ante diximus, ab natura profectum, majus factum propter consuetudinem videmus, aut quod in morem vetustas vulgi approbatione perduxit."

and as of the importance belonging to it. This is easily explained by the consideration that in their time, the greatest part of the old national customary law had already long passed over into other forms of law, and therefore appeared no longer in its indigenous shape (S. 15. 18.) Their age was moreover little suited to the origination of a new general customary law in the purely popular way (S. 7.) Hence it was for the most part particular customary law only, which presented itself to them in actual life and to this most of the passages as to customary law, preserved in their writings, refer.(b) However the views which they express upon it are in the main satisfactory and if modern writers have been misled by them into erroneous opinions, this has been merely through the indefiniteness of expression. According to the theory of the Romans a proposition of law is to be regarded as established when it appears in a long, of many years, *consuetudo* and the ground of its validity is the tacit consent of the *populus*, therefore of those who employ that proposition of law *(utentium,* and *omnium.)*(c) This has been misunderstood into custom comprehending the ground of origin of law and into the formation of this law being effected by the arbitrary resolution of individuals, consequently by the will of those persons who make law also in the *comitia.* This last explanation was particularly important since by it, the customary law seemed to be placed in immediate connexion with a special political constitution, whence it had lost its applicability to the Rome of the Caesars and to our

(b) Püchta Gewohnheitsrecht I. S. 71. fg.

(c) Gaius III. S. 82. Ulpian tit de leg. S. 4. L. 32—40, de leg. (1. 3.) S. 9. 11. J. de j. nat. (1, 2.)

monarchies. In fact however *consuetudo* is to the jurists not the ground of origin of this sort of law but merely its sensible manifestation, therefore a medium of recognizing it, just as they are accustomed to conceive in this way the forms of written law (S. 22.) The correctness of this view is established by the fact that in numerous passages the *ratio*, that is to say the common immediate conviction of the existence and the validity of a rule of law, is as well as the mere custom, called a peculiar ground of origin.(d) In like manner *consensus* is not a voluntary decision, which might just as well have been conceived to be in an opposite direction, but the opinion agreeing from an innate necessity. Then also the *populus* to whom this *consensus* is ascribed is not so much the collection of the citizens registered at any one time in tribes and centuries, as rather the ideal Roman people continuing throughout all generations, which can be conceived as constantly the same in the most various political constitutions.(e) The correctness of this explanation shows itself in the first place in the

(d) L. 39. de leg. (1. 3.) "quod non *ratione introductum*, sed errore primum deinde *consuetudine obtentum est*: in aliis similibus non obtinet." The *alia similia* are the future cases entirely similar. L. 1. c. quae sit. l. c. (8. 53.) "Nam et consuetudo praecedens, *et ratio quae consuetudinem suasit*, custodienda est." Comp. Puchta. S. 61. 81.

(e) L. 32. S. 1. de leg. (1. 3.) is with much plausibility quoted against this last assertion, in this law there is an argument from the *expressus populi consensus* in the *lex* to the *tacitus* in the *consuetudo*. First however by this comparison not so much the validity of actual custom as the sort of this validity (the legis vice) is made good. (Puchta S. 84.) Secondly also I do not at all assert that the old jurists constantly conceived with precision the oppositions in the meaning of populus. There would only be a contradiction of the view here maintained if the old jurists had, expressly with a clear knowledge of the opposition, recognized the assembly of the *cives* and not the ideal nation, as subject of the customary law.

high degree of certainty which is declared to be the fundamental character of customary law(*f*) and which is obviously more consistent with a common conviction of the people than with a voluntary determination of individuals in single recurring acts. Still further the correctness of this explanation is verified by the conditions and tokens which are furnished to us for customary law.

For example a customary law is to be recognized in the common conviction of the skilled in law, the *prudentium auctoritas.*(*g*) These may very well be the organ in which the common consciousness of the people lives and works with especial power and definiteness (S. 14.) On the other hand it would be entirely unjust to permit the whole nation to be bound by their arbitrary decision, and still customary law is to prevail among the whole people and not among the jurists alone. Further the concordance of judicial recognitions is stated to us as an especial medium of recognizing customary law.(*h*) In this statement also there is a confirmation of our explanation, because these recognitions may furnish an especially trustworthy proof of the existence of a conviction of the people, while the arbitrary decision of the judge could not possibly bind the nation. It would be entirely erroneous to ascribe, to the *res judicatae* in themselves and apart from cus-

(*f*) L. 36. de leg. (1. 3.) : "quod in tantum probatum est ut non fuerit necesse scripto id comprehendere."

(*g*) L. 2. S. 5. 6. 8. 12. de orig. jur. (1. 2.)

(*h*) L. 38. de leg. (1. 3.) L. 1. c. quae sit. l. consu. (8. 53.) As to the particular customary law in particular see L. 34. de leg. (1. 3.) Puchta I. S. 96. It is remarkable that the res judicatae are quite commonly included in the enumeration of the law-sources by the rhetoricians—not by the old jurists (S. 22.) They were however known in all times.

tomary law, such a power, since in direct contravention of this it is expressly enacted that no judge must allow himself to be determined by precedent alone.(i) This can only mean that precedents, in themselves without influence, are to have nevertheless the greatest influence as testimonies to a customary law. To the extension of these conditions belong—the rule that a demonstrable error excludes the existence of customary law(k) and the other rule that the Emperor is to determine when the custom is too new of itself alone to place beyond doubt the existence of a common consciousness.(l) More than this upon the conditions of customary law is not to be found in the Roman law. The view that customary law must be proved as a pure matter of fact by him who invokes it, is entirely foreign to that law.(m)

Lastly as to the operation of customary law the Roman law sets forth the proposition that it represents *vicem legis.*(n) That is to say according to the explanation given above (S. 22.) that it operates not merely with just as evident a power but also in the very same way as a *lex*, so that it is not, like the *jus honorarium*, confined by its nature to a defined district or a defined time. The possibility however of a particular customary law is in no way in contradiction with this property, in the same way as a written law also may be promulgated for a single city or province.

(i) L. 13. c. de sent. et interloc. (7. 45.) see above S. 24. note *r*.

(k) L. 39. de leg. (1. 3.) see above note *d*. Puchta I. S. 99. The completely natural reason consists in the custom being then demonstrably the result of error therefore no expression and token of a common consciousness of law which alone can lend it power.

(l) L. 11. c. de leg. (1. 14.)

(m) Puchta I. S. 110.

(n) See above S. 22. note *x*.

This operation may show itself in a two-fold way. First as a merely enlarging power when the expression of the written law is indefinite or ambiguous(o) or when upon a question of law, a determination of written law is entirely wanting.(p) This last may be especially a necessity now in cases of municipal intercourse, in which it is completely necessary to have some settled decision or other while the purport of this determination may be a matter tolerably indifferent. If such a settled custom for such cases is wanting to a city the custom of the city of Rome must be followed(q) a rule not based merely upon the importance of Rome as the first city of the empire but still more upon the fact that it originally comprised the nation. In a time therefore in which the nation as a whole by reason of its indefinite extension, was less the master of a common consciousness of law, Rome might aptly as representative of the nation have authority in the generation of a new people's law where this was indispensable. This prerogative was in the Eastern empire transferred to Constantinople(r) and this was a mere result of the generally similar position of the two cities and was by no means justified by a like historical relation. Moreover this extending may appear in a different compass: sometimes as to a single hitherto unobserved side of an institution of law already known—sometimes as the generation of a wholly new institution, consequently as a widening of the actual system of law. In this more important class the mores are mentioned as grounds of

(o) L. 38. de leg. (1. 3.)

(p) L. 32. pr. L. 33. de leg. (1. 3.) comp. Puchta I. S. 87.

(q) L. 32. pr. de leg. (1. 3.) "si qua in re hoc defecerit ... tunc jus quo urbs Roma utitur servari oportet."

(r) L. 1. S. 10. c. de vet. j. enucl. (1. 17.) S. 7. J. de satisd. (4. 11.)

origin of the *cura prodigi*, of the prohibition of donations between husband and wife; of the pupillary substitution.(s)

Secondly the power of customary law may be exhibited in opposition to the purport of a written law whether it be by putting another in place of a text of the written law or merely by abrogating the existing one. This power, we have already been necessitated to ascribe to customary law in consequence of its entire conformity with the expression *(legis vis)*; it is however expressly stated as a universal rule(t) and what must remove all doubt of this, is the circumstance, that customary law has exercised this power in all ages of Roman history, in the broadest way. Thus the whole of that portion of the edict of the Praetor, by which the *jus civile* and especially the law of the twelve tables is corrected, is nothing but an abrogating customary law of the validity of which not a single Roman has expressed a doubt.(u) In like manner the operation of *usus* in marriage is partially removed by customary law, just as the second chapter of the *lex Aquilia* and the *interrogatoriae actiones*.(v) Justinian moreover has recogniz-

(s) L. 1. pr. de curat. (27. 10.) L. 1. de don. int. v. et ux. (24. 1.) L. 2. pr. de vulg. et pup. subst. (28. 6.)

(t) L. 32. S. 1. de lég. (1. 3.) ... "quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur conf. Puchta ut sup. S. 86. 90.

(u) Cicero de invent. II. 22. "Consuetudinis autem jus esse putatur id, quod voluntate omnium sine lege vetustas comprobavit. In ea autem ... sunt ... eorum multo maxima pars, quae praetores edicere solent. The misunderstandings of the earlier historians of law upon this point may now be regarded as entirely removed.

(v) Gaius 1. S. 111. L. 27. S. 4. ad L. Aquil. (9. 2.) L. 1. S. 1. de interrog. Act.

ed that power of customary law in so many particular precepts without expressing any doubt whatever to the contrary that it is scarcely conceivable how from the stand-point of his legislation a doubt could even have been raised upon the matter.(w) Two grounds however have often been made available in support of a different opinion. In the first place that it was said in several of the texts already quoted that custom prevails in default of a written law; what so often is taken to mean *only* in this default. This mode of explanation at all times questionable, is in the present case completely refuted by the context.(x) In the second place a text of the Code has more appearance of weight—custom can never overcome a written law; but here custom generally is not spoken of but particular customs and these must always yield in a conflict with an absolute written law of the country.(y) All this had in Justinian's time no further significance as to propositions of a general Roman customary law which had arisen before his time; since these must according to his intention either have been included in the law books or have had no further influence at all. It was on the other hand applicable to each subsequently arising customary law and indeed to the already existing particular law, so far as this could have validity according to the limi-

(w) S. 11. J de j. nat. (1. 2.) S. 7. J. de injur. (4. 4.) L. 1. pr. c. de cad. toll. (6. 51.) L. 1. S. 10. c. de vet j. enucl. (1. 17.) Const. Haec quae necess S. 2. Nov. 89. c. 15. Nov. 106.

(x) L. 32. pr. L. 33. de leg. (1. 3.) Comp. Puchta I. S. 88. In particular such an argumentum a contrario is wholly inapplicable to the first of these texts since the author in the words immediately following says exactly the contrary (S. 1.)

(y) L. 2. c. quae sit long cons. (8. 53.) see upon this supplement 2. of this volume.

tation just mentioned. Since such a customary law was not included in the plan of the new collections, their exclusive nature could not hinder the *continued existence* of that law.

Since this sort of law-sources is also mentioned in the Canon law and the statutes of the empire, this part of the subject is dealt with here by way of supplement.

In the Canon law many texts of the Roman law are inserted word for word; from this therefore nothing new results.(z) The following propositions may be considered new and peculiar to that law:—

1. The custom must to be binding be *rationabilis*. By this very indefinite expression although it also may be occasioned by texts of the Roman law, something special seems to be here meant viz. an examination of the materials of the contents and a recognition of them so far only, as they appear good and convenient and this is the more probable as this condition is not stated as universal but merely with reference to the case of a conflict with the written laws.(aa)

2. The custom must be *legitime* or *canonice praescripta*.(bb) From this many have made out a

(z) C. 4. D. XI. = L. 2. c. quae sit l. consu. (8. 53.) — c. 6. D. XII. = S. 9. J de j. nat. (1. 2.)—c. 7. D. XII. = L. 1. c. quae sit l. c. (8.53.)

(aa) c. 11. X. de consuet. (1. 4.) C. 1. de constit. in VI. (1. 2.) The meaning of these passages is discussed in supplement 2.

(bb) c. 11. X. de consuet. (1. 4.) C. 3. de consuet in VI. (1. 4); c. 9. de offic. ord. in VI. (1. 16.) C. 50. X. de elect. (1. 6.) In Meürer Jurist abhandlungen Leipzig 1780 N. 5. who asserts that this text does speak of a praescription but not for the establishment of a custom but for the acquisition of a single right, will be found an enquiry on this matter. He however adopts the explanation given in the text at least in regard to c. 11. X. de consuet. Glück 1. S. 86. Num V. has adopted

practical *praescription* (limitation,) the nature of which however is not at all suitable to the establishment of a general rule of law, and if the provision is so understood no definite application would there be permitted, for there exist *praescriptions* of very different periods of continuance; but here no definite time is stated. Very probably this expression in accordance with the Roman law must for this reason be taken to denote merely a long continuance generally and therefore by *legitime praescripta* here is often understood *longa* or *diuturna.*

Lastly many laws of the empire make mention of customary law but merely by way of recommendation to the judge to conform to it without more accurate determination of its conditions or operation.(cc)

SECTION XXVI.

EXPRESSIONS OF THE ROMANS UPON SCIENTIFIC LAW.

From early time, the respect for persons skilled in law and the influence of those persons upon the developement of law by practice, are acknowledged.(a) It is visible at a glance that this influence must grow when the preponderance of scientific cultivation was joined to the confidence in their practical experience.

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the opinion as to the former from him. Eichhorn Kirchenrecht S. 42. 43. will have those passages understood not of a customary law proper but of an *observance i. e.* a tacit written law whence a third person would derive rights (S. 206.) It may be that a regard to such cases has given occasion to those expressions. It is however self-evident that all these are used generally, thus an obscurity of thought may have been the reason for an uncertain expression.

(cc) c. c. c. art. 104. Conc. ord. cam. Tit. 19. provem. Tit. 71. Rec. Imp. Nov. S. 105.

(a) L. 2. S. 5. de orig. jur. (1. 2.)

Augustus increased and modified this influence by conferring upon single approved jurists the right of giving opinions which must be followed as written laws *(legis vicé)* by the judges, so long as opposing opinions of jurists equally authorised were not brought forward.*(b)* By the side of these, the general undefined authority of the juristic teachers and writers continued—an authority which had not indeed *legis vicem* but operated upon each judge merely by its innate intellectual power, when in any case whatever either no opinions or contradictory ones were produced.

The privileged opinions are mentioned by Gaius as a still existing institution. They probably disappeared with the scientific life of the law generally. Then as the number of the jurists of reputation speedily diminished, these few obtained an inordinate influence upon the practice of law, and this consideration may well have given occasion to no privileges of this kind being any more conferred.

However the general influence of the highly important juristic literature was not removed with them. On the contrary this influence of the past, living on in

(*b*) Gaius 1. S. 7. S. 8. J. de j. nat. (1. 2.) L. 2. S. 47. de orig. jur. (1. 2.) I distinguish therefore the Responsa, that is to say the opinions of still living and certainly authorized jurists upon a particular case submitted to them, from the opinions of present and earlier writers that is to say the aggregate juristic literature. The influence of Responsa, as a law binding the judge, was entirely matter of positive law and is so stated in the texts quoted. The influence of the literature was something wholly natural and no judge was bound thereby. Gaius speaks of the first without intending to exclude the second. Hugo Rgesch S. 811 ed. 11. explains the texts quoted of the second influence and denies or at least throws doubt upon the first. That however seems to me wholly incompatible with the special expression Responsa. However the settlement of this disputed question does not belong to this place.

books, must have grown in the exact proportion that the intellectual power of the present was lessened. In the great mass of this literature and the many controverted points presented in it, the need of formal rules for the application of it, must soon have become felt. Isolated rules seem to have been laid down from the time of Constantine.(c) Valentinian III. however first issued a comprehensive direction(d) by means of which the conception of a common opinion of the jurists was made practically available in a wholly other way, than was earlier attempted by the order as to the unanimous opinions; and this law still existed when Justinian began to rule. However at this time the difficulties in the application of scientific law had been diminished but not removed by this law.(e) And this consideration moved Justinian to a wholly new and far more decisive measure.

Without reference to the limits drawn by the law of Valentinian III, he caused to be extracted from the whole range of the juristic literature what appeared necessary for a complete view of the law and particularly of the practice of law. This was put together in a book and promulgated as written law—all the rest was abolished. Thus therefore an extract from the *jus* was now elevated to a *lex* and what in its original shape must have prevailed as *jus* no longer existed. Moreover he entirely forbade for the future the arising of a new juristic literature. Only Greek translations of the Latin text, and as mechanical aids, short summaries of the contents of the Titles were

(c) L. 1. 2. C. Th. de resp. prud. (1. 4) (newly discovered.)

(d) L. 3. (otherwise un) C. Th. de resp. prud. (1. 4.) A. D. 426.

(e) Savigny Gesch. des R. R. im Mittelalter.

permitted; if however a special book, commenting upon the written laws was composed this was to be destroyed and its author rendered liable to the punishment of *falsificatio*.(*f*) The sole medium of the maintenance and inculcation of legal science would therefore be the oral instruction in the law-schools which therefore were provided by Justinian with a new plan of instruction.(*g*) Nevertheless if the prohibition mentioned is taken into account, it is without doubt what sort of instruction was meant. Certainly not an absorption of the law books by the free intellectual activity of the teachers whereby a cognate activity would have been excited in the scholars and thus a living science have been preserved; for such a procedure would have been in manifest contradiction to the aim of the inhibition. The whole instruction must rather have consisted in a mechanical exercise of memory, and the services of the teacher in the matter must have been confined, to assisting the learners in overcoming the subjective difficulties, which must have attended their unacquaintance with a strange object-matter of so immense a compass. A single thought was at the foundation of all these arrangements—let the selected and arranged intellectual product of those who went before, be sufficient: each new production is unnecessary for it and can merely again destroy the work now established.

These views may well appear to some in their literal meaning too strange for acceptance and they hence look for a figurative or modified meaning, as I believe wrongly. When Justinian began to reign he probably

(*f*) L. 1. S. 12. L. 2. S. 21. L. 3. S. 21. C. de vet. j. enucl. (1. 17.)
(*g*) Const. Omnem.

heard voices, as loud upon the frightful confusion of the law and upon the urgent necessity of a thorough reform, as Frederick II of Prussia in 1740. A fortunate accident directed him to some clear-sighted jurists such as had not appeared for upwards of a century and he was himself not wanting either in a knowledge of law of his own or in activity and desire of glory. An attempt therefore was made to remedy, what was felt to be the first evil, the insuperable mass of juristic literature and the contradictions appearing in it. There had been no preceding experience of a similar kind, by which the undertaking could be tested and they might fairly therefore believe in the imperial hope of producing in this way a condition entirely satisfactory and in the necessity of furthering that hope by a statutory inhibition of the recurrence of the old evil. They had besides no reason to fear that by this inhibition an actually existing intellectual life would be suppressed, as would perhaps have happened, if Hadrian or Marcus Aurelius had entertained a similar purpose, for the force and culture of Justinian's time was sufficiently clear to every one and in it there was certainly nothing to be spoiled. It is true that the threat of punishment and of the destruction of the books is very foreign to our habits and in presence of the art of printing and the active commerce of so many European states, the mere thought of a similar procedure would be wonderful; but if we look away from the violent execution as the accident of the time, the fundamental idea is the same self-delusion which, as deeply grounded in the nature of men, constantly recurs in all intellectual departments and especially in the religious, inasmuch as we believe ourselves bound to establish, as exclusively valid for others, each embodiment of

thought which we have brought forth by the honest exertion of our own force, for ever banishing error perhaps however at the same time spiritual freedom. Such a juristic formula of concord Justinian established and no one was to venture to destroy the peace which it was destined to bring. Is it for us to judge him hardly on this matter? Our circle of vision is more widened by the experiences of one to two thousand years and the essentials of those thoughts of Justinian even now dwell in those who foster expectations so visionary from the composition of new codes, it is true without the power and certainly also without the wish to bring their designs to execution with violence so great as Justinian sought to do.

These considerations ought not perhaps to justify the procedure of Justinian, to which I am certainly not inclined, but merely to place it in a milder light especially however in such a light as to make it understandable, that the matters of fact, with the exhibition of which we are at present concerned, are to be taken literally and protected against every technical or forced interpretation.

SECTION XXVII.

VALUE IN PRACTICE OF THE ROMAN DETERMINATIONS UPON THE LAW-SOURCES.

Now that the expressions of the Roman law upon the law-sources have been presented (S. 22—26.) the question of what practical value from our stand-point is to be ascribed to them, is to be answered. This question relates to each state in which the reception has once found a place and it must be conceived and answered in the two following different applications:

first—is the developement of law from the period of reception to the present time to be examined and determined according to these rules? Secondly—have these rules binding force as to the future cultivation of the law in such state? The first application refers to that which we must recognize as real contents of the now prevailing common law—the second to its possible modifications in the future. It is however for the two applications one and the same question to which the answer cannot turn out differently for the two sides of it.

At the first glance nothing appears more natural than the answering of it in the affirmative, for when the Roman law is of general validity why should it not be valid in this important matter of the continuing developement of law? The modern writers are in the habit, of not starting the question but of tacitly answering it affirmatively, and on this presupposition, of employing texts of the Roman law, under the reservation, it is true, of omitting this employment wherever it would be altogether too hazardous.

I will first shortly sum up the shape which the consistent affirmation of this question would assume. As for the written laws proper (S. 23.) it would be at least permitted to renounce the co-operation of the senate in their composition since such a body exists, in the sense of the Roman empire, in no modern state; but we must draw from the ordinance of Theodosius 2 the exclusive distinguishing marks of a real written law. The thing is still more important as to rescripts of the ruler of the country in individual cases, which must be recognized as written law by each judge, at least in the limited manner in which they are to be

received according to Justinian's novels. Modern writers have declared themselves to the contrary.(a) Others hold firmly to the application of the Roman rules, at times even without reference to the limitations produced by the novels, while however they tacitly ascribe to those rules a wholly different sense. For example they pass over in silence the main thing, the legal force in the individual case and ascribe to the rescripts legal force merely in future like cases (b) which never, according to the Roman rules, attached to the rescripts but merely to the decrees (S. 23. 24.)

As to the customary law the applicability of the Roman law in general is not at all doubted. Only it is sometimes found that an individual writer, when he altogether disputes a particular application of the customary law, which however is recognized in the Roman law, seeks to remove that difficulty by critical doubts as to the applicability of this law (c).

Lastly as to the scientific law (S. 26.) people are accustomed to pass over in silence the not unimportant law of Justinian concerning the juristic books and I know not a single modern writer who asserts that from obedience to that law, such books must even now be destroyed. Such a want of affection for his own

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(a) Mühlenbruch I. S. 35.

(b) Glück 1. S. 96. who quotes other writers for and against his opinion.

(c) Thus *e. g.* Schweitzer de desuetudine, p. 52. 53. 84. The whole work is directed against the application of the pure desuetudo and therefore he asserts that in this question the Roman law has no applicability: as to all the rest of the customary law it must prevail and actually for the nearly related question of the *obrogatio* by custom.

work would in fact not be conceivable; and on what ground should this law have smaller power than others upon cognate questions?

If we put all this together the result is that our jurists quite arbitrarily sometimes receive and sometimes tacitly pass over the provisions contained in the Roman law upon the law-sources. Since now an absolute application of all these provisions would be wholly impossible, there arises out of this very impossibility a two-fold reason against any application at all—First this proceeding is illogical and they can only protect themselves from this reproach by supposing *e. g.* that this inhibition of the juristic books has been in turn abolished by a more recent customary law—Secondly it is to be considered, that those precepts which are accepted by some as still prevailing, when separated from their connexion with those rejected, assume a wholly different nature and must themselves become unsuitable.

If one probes the matter more thoroughly and puts the question why certain of these provisions, especially such as concern written laws, ought evidently to be regarded as inapplicable, the reason will be found in the fact that they belong to States-law which is not among the received parts of the foreign law (S. 1. 17.) This reason however applies not only to legislation but just as much to every other mode of formation of law in general, so that he, who will hold firmly to this principle, must also recognize that the Roman law is not to be applied at all to the law-sources. Hence among others, the disputed question as to the meaning of the L. 2. C. *quae sit longa consuet.* is wholly unimportant for the practical law.

All that has here been said of the inapplicability of the Roman law to the doctrine of the law-sources, is completely true also of the canon law.

The case would be otherwise in the German states with the laws of the Empire, since these had indisputably the force of law for public as well as private law. However there can be nothing to say of these in this place since they contain absolutely nothing as to the law-sources, except the general and indefinite recognition of a customary law (S. 25.) which in fact did not require this recognition.

SECTION XXVIII.

VIEWS OF THE MODERNS ON THE LAW-SOURCES.

The main points are now to be stated, on which the views of the law-sources, which appear prevalent among the moderns, differ from those set forth in this work. For that purpose the bare statement of the opposition, without reference to particular writers and without extending into a controversy, will here be sufficient.

Legislation is very commonly put in an altogether different relation to the law-sources. It is often considered the single true and valid ground of origin of law beside which all the remaining ones ought to appear as friends-in-need and had better not appear at all. Hence likewise the science of law has a very accidental and changing object-matter and so dependent an existence, that by the progress of legislation to completeness, it will continually become less important and in an imaginable condition of legislation must entirely disappear. In the further developement of this fundamental view lies the unlimited value which people in modern times have

set upon comprehensive codes and the brilliant expectations which have attached to the composition of them. It also happens that the fundamental opinion is received by such as do not share the latter view or at least do not bargain for such an important consequence, and this would perhaps be found to be the opinion of the greater part of respectable practitioners.

From legislation we will now pass to the consideration of scientific law. The treatment of the early writers by the modern is often very arbitrary and unequal, so that weight is admitted or denied to their opinions in particular cases, without any fundamental principle for this changeable procedure even being sought for. In particular the opinion of the old practitioners is not seldom regarded as if it had made an unchangeable conclusion for all time and as if each generation could not make good its claim to the developement of law by innate power, as was done in each earlier time. People then involuntarily accustom themselves to regard our relation to those early writers, as Valentinian III practically established his to the times which preceded him. This settlement however was a completely positive one which is not in itself understandable in any age: it had there an innate ground quite peculiar in the practical extinction of legal science as of intellectual life in general, while to our age, whatever may be thought of it in other respects, a great activity is certainly not to be denied.

As to the customary law so summary a review of the prevalent modern opinions will not be sufficient. I have the rather deferred until this place the definite exposition of my own opinions upon our practical customary law, since they can only become comprehensible in connexion with the views prevailing elsewhere.

According to the prevailing view customary law is an unnatural sort of generation of law, which therefore in order to be accepted, requires a wholly special justification. This will in republics consist in the circumstance that the same *populus* (S. 10,) which in a defined way acts uniformly, is at the same time the bearer of the law-giving power. Hence therefore each custom at all times and of necessity carries with it the tacit assent of the legislator to the rule put in practice *(consensus tacitus specialis,)* and each custom therefore in consequence appears in a republic as a tacit law. Otherwise in our monarchies in which the people which exhibits the custom is without legislative power and the monarch who has it, takes no part in the custom. Even constitutional monarchy makes in this matter, no essential difference since often no single member of the chambers has taken any part in the custom and besides the chambers alone without the princes can never make law. In this view, therefore customary law appears as a species of opposition of the subjects to the ruling power, as an arrogation of a portion of the supreme power, and so perilous an undertaking needs to be justified with peculiar caution. This could be sought for only in the assent of the law-giver which however was not, as in the republic, embraced in the custom itself but must be added to it from without. In the countries, in which Roman law prevails, that creates no difficulty, for the Roman law says quite expressly that customary law must be followed. Only when the custom is to abolish a written law, the L. 2. c. *quae sit longa consuetudo* seemed to render another confirmation necessary and this they found in the *consensus specialis tacitus* of the prince for the particular case. So there still appear two different changes

of view since at one time it is said—the consent is already to be implied from the bare toleration of the custom—at another however—it must be specially shown that the law-giver has known of this custom.(a) What has been said relates to customary law in general. In each single case bare custom, that is to say uniformity of action, is regarded as the peculiar ground of origin of the rule of law so that, as it is supposed, this ground of origin must always permit of resolution into definite, individually demonstrable acts. This limited point of view could at the best be applied to particular customs of which alone people, for the most part, are accustomed to think. To the numerous and important cases in which modern customary law connects itself with scientific law, this view is not susceptible of any application.

These fundamental views have also had the greatest influence upon the practical treatment of the individual questions which concern customary law. These relate in part to the conditions—in part to the proof—in part to the operation of customary law.

SECTION XXIX.

VIEWS OF THE MODERNS ON THE LAW-SOURCES—*(Continuation.)*

The conditions which are ordinarily recognized for the origination of customary law relate entirely to the nature of those single acts from which, it is admitted, that that law constantly proceeds (S. 28.) These conditions have consequently only an incomplete applica-

(a) Glück 1. S. 85. Guilleaume Rechtslehre von der Gewohnheit Osnabrück 1801 S. 24—27.

tion even to the particular customary law and even as to this, the single acts ought to be regarded as not properly grounds of origin but rather as appearances or distinguishing marks of a previously existing common conviction of law. With these modifications however truth may certainly be ascribed to these conditions so that they must be separately tested and established. In fact, as people assert, those acts must possess the following properties in order to be adapted to the establishment of a customary law.

1. There must be a plurality of acts. How many was long disputed. One ought certainly not to suffice. As a rule two also not, although exceptionally two might avail. Lastly most have been inclined to leave all this to the estimation of the judge, with which one may remain satisfied. The judge will, according to the different quality of the acts, sometimes require more sometimes fewer and thus be steadfast to the point of view, that by the plurality of acts he will be guarded against the influence of the individual and accidental which may assume the delusive appearance of an act proceeding from a common conviction of law.(a)

2. Uniform, uninterrupted acts; that is to say the custom is interrupted when among these acts others resting upon an opposite rule have come forth. This determination is beyond all doubt.

3. The acts must recur throughout a long period. The length of the time was specially matter of dispute. Some required 100 years because once, in some place or other, the expression *longaevum* has this meaning.

(a) Lanterbach I. 3. S. 36. Müller ad Struv. I. 3. S. 20. Glück. I. S. 86. N. 1. Especially however Puchta Gewohnheitsrecht. II. S. 79. fg. S. 85.

Many more thought of the customary period of limitation according to the expression of the canon law and indeed of *longum tempus*, therefore 10 years, since of 20 years there could be no question, for the prince or the people, against whom, as it were, this new law was acquired, is constantly present. Only against the canon law, therefore against the church 40 years were required; against sovereign princes a period beyond memory. At a later time most have been inclined to fix no definite time but to abandon all to the discretion of the judge which is the satisfactory method. In this matter as in that of the plurality of acts it is of the utmost consequence to guard against the individual, casual, transient, through the deceitful appearance which they may assume, being falsely regarded as indications of a common conviction of law lying at the foundation of them.(c)

4. That judicial decisions may serve as such acts, was generally recognized. On the other hand many assert that such decisions are wholly indispensable by a customary law; this however is rightly rejected by most.(d) For myself however, I cannot admit the unconditional admission of decisions for this purpose. Allowing for the difference of the cases, what has been said above (S. 20.) of the practical works of the jurists, is equally true as to these. If therefore the decisions are expressly based upon a customary law, they are weighty testimonies to its existence. In like manner when they merely in general recognize a rule as true and certain without expressing themselves definitely

(c) Puchta II. S. 93. fg.

(d) Lauterbach I. 3. S. 35. Müller ad Struv. I. 3. S. 20. Glück I. S. 86. n. v. Guilleaume ut sup. S. 31. especially Puchta II. S. 31. fg.

as to its origin. It is otherwise when they derive a rule of law from theoretical grounds and indeed from a false theory: in such a case the decisions have merely a theoretical character and the existence of any rule in the general consciousness, is not recognizable by them.

5. Undertaking of the act in the feeling of a legal necessity (*necessitatis opinio.*) If therefore many, in the same way and for a long time, have exercised pure liberality, no customary law can arise from that, for the giver as well as the receiver has continually understood that the act is voluntary and might be left unperformed or take a different direction. This condition is the most important of all and its importance will be presented in connexion with the still more definite one which immediately follows. The texts of the Roman law in which it is expressly recognized have already been given above (S. 25. note(*d*)). Judicial decisions are especially adapted for the recognition of a customary law on the ground that they can proceed merely from the conviction of the judge as to the law and not from arbitrary will. Less adapted are contracts in which an element of arbitrary will always dwells. These however may also properly serve as a medium of recognition of a customary law in so far as they either set forth as true a rule of law or by their mere sanction accept it.(*e*)

6. The acts must not rest upon error. This condition had in its support an express recognition of the Roman law,(*f*) however people have by it, involved themselves in an inextricable contradiction. Since

(*e*) Puchta II. S. 33. fg.

(*f*) See below note (*l.*)

the rule of law must first have arisen through custom, it was certainly not yet in existence at the period of the first act. However according to the foregoing rule the first act must have been induced by the *necessitatis opinio*; consequently if it rests upon an error it must not be of any account at all as to the origination of customary law. The same is true of the second act which now becomes the first and of the third and every following one. The formation of a customary law is hence, unless one of those conditions is given up, wholly impossible. The contradiction is here so manifest that in fact some have not only suffered error, but have quite consistently regarded it as necessarily attached to every customary law without considering that this view is not compatible with the expression of Celsus.(g) From our stand-point no contradiction whatever exists since the rule of law was merely manifested by the custom, not generated by it; consequently in the first demonstrable act the *necessitatis opinio*, free of all error, might and must have been present. Nevertheless this condition is not to be accepted as unlimitedly true. For example when by the side of the actually existing popular conviction, the theoretical error has served merely as a corroboration (S. 20.,) the error does not stand in the way. It is also exactly the same when the act has a nature so external and in itself indifferent that an innate conviction cannot properly be thought of. Thus *e. g.* it may

(g) Schweitzer de desuetudine P. 78. (Hübner Berichtungen und Zusätze zu Höpfner S. 164. The latter seeks to come to terms with L. 39. de leg. by saying that it is confined to erroneous interpretation and denies to such the force of customary law; but in the first place this limitation must be arbitrarily imported into the text and in the second if every other error is no hindrance to the arising of a real customary law, why should this be so?

now be regarded as established that from the time of the middle ages, a form foreign to the Roman law as to the signatures and seals of witnesses has erroneously crept in. This originally erroneous form has, by the long and uniform use, in fact become a legal one.(h)

7. The acts ought to be reasonable *(rationabiles.)* The texts of the canon law, from which this condition is derived, have been already referred to above (S. 25. note (z)). If this condition is taken in a positive sense, as adaptation to the purpose and beneficialness of the rule expressed in the custom, it is very hazardous to the certainty of law to resign to the judge the decision upon a quality so indefinite. Hence it is more frequently conceived in a purely negative sense so that by the rule only customs wholly unreasonable, or contradictory of the moral feeling would be repelled.(i) A text of the statute for the administration of penal law *(peinlichen Gerichtsordnung)*, in which a number of "bad unreasonable" customs are abolished and disapproved of,(k) seems to favour this interpretation less practically dangerous than the other. In this text however the principle, with which alone we are concerned, that unreasonable customs are in themselves invalid and

(h) Upon error in customs comp. Puchta II. S. 62. fg.

(i) Glück 1. S. 86. n. III. Comp. especially Puchta II. S. 49. fg.

(k) C. C. C. Art: 218 ... "As we then by our imperial power hereby abolish, annihilate and undo and they shall not be established for the future." This text can the less serve for a general determination upon the enduring nature of the customary law, that the mention of customs in it is in part merely accidental. Besides some of the positions of law abolished by him were based not upon customs but upon the statutory law. This text too was intended to establish in criminal law the relation of the general to particular laws, not the wholly different relation of the written to unwritten law.

not adapted to the formation of a legal position, is not at all stated: the Emperor rather finds it necessary to abolish them by his own power which presupposes their validity up to the time of this abolition unless one is willing to assume a very inaccurate expression in the law.

If these last three conditions are embraced as a whole, there results from them the following view based upon the nature of customary law. The rule of law arises through the common consciousness of law, or through the immediate conviction of the truth and independently (without external sanction) binding power of the rule. This conviction may manifest itself by uniform single acts, that is to say by custom. However these must not be attended with a consciousness of the character of voluntary action as *e. g.* liberality or also a frequently recurring delinquency in which indeed no actor doubts as to the wrongfulness and therefore as to the arbitrary character of his act. As little ought they to proceed from demonstrable error since in this case also there is absent from them the expression of this immediate conviction upon which everything depends.(l) It is a very instructive example when a judge by oversight employs an unglossed text of the Justinianean law, merely because in his edition such texts are not plainly distinguished from the others (S. 17.); even if several should follow his

(l) L. 39. de leg. (1. 3.) "Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est: in aliis similibus non obtinet." That is to say: when the custom proceeded not from a common conviction of law but even demonstrably from an error, which necessarily excludes this conviction, no customary law is therefore to be supposed and we find therefore in those customs no reason for deciding the future cases of like kind according to this rule.

example, no customary law would arise out of it. If therefore we consider error and unreasonableness merely as qualities of an act, by which it becomes incapable of co-operating for the recognition of a customary law, the condition requiring the absence of them does not appear as different from the general condition of the *necessitatis opinio*, but as a mere consequence or developement of it. Since a correct insight into the nature of customary law rests mainly upon this point, it will not be superfluous, to illustrate what has here been said, by some examples. The Roman law forbids the taking of interest upon interest. If now in a place this sort of usury were very common but always artfully concealed, no customary law could in consequence be accepted since from the concealment, the absence of an honest conviction would be clear. On the other hand it is the general usage in commerce, at the end of a year sometimes even of a shorter period, to close the account and carry over the balance to a new account where it then immediately again bears interest, although the balance itself is partly composed of the interest of the concluded period. This is entirely contrary to the rule of the Roman law; it is done however openly and generally and cannot be otherwise without destroying the simplicity of accounting: the aim of the Roman prohibition is nothing to the purpose in this case. The prohibition is therefore removed by a general custom of commerce, as to which it is nothing to the purpose how many are able to give an account to themselves of it in this coherent way, since all act so with the feeling of the necessity and legality of their procedure. If we now apprehend these conditions according to the present exposition,

they appear applicable not merely to single acts and particular customs but to the far more important general customary law of modern times. Then as to the difference which has been above stated in the practice of law, according to whether it arose out of a false theory or out of the consideration of the altered circumstances and needs (S. 20.)—this distinction is in fact no other than the application of the principle here unfolded. False theory is something *errore non ratione obtentum* and hence without the capacity for prevailing and operating as customary law: the practice on the contrary which has proceeded from the necessity of our relations, has the *ratio*, the *necessitatis opinio*, for its basis, and must consequently be valid as real customary law, even when many an historical error has to be intermixed with the attempt at a theoretical justification of it.

8. Lastly many state as a special independent condition, the publicity of the single acts. In truth many a single act may by its publicity be specially adapted to the laying down of a customary law and many another by its secrecy unfit for that purpose, as has been just shown by some examples. This is founded on the act being, through these circumstances, more or less adapted to be distinctive marks of an under-lying conviction of law. These moreover, who ascribe a peculiar importance to publicity, are led to it either by the *consensus populi* or the *consensus principis* therefore by a fundamental error as to the nature of customary law (S. 28.) According to this conception the general requirement of publicity of acts cannot be at all introduced into the matter.(m).

(m) Puchta II. S. 40. fg.

SECTION XXX.

VIEWS OF THE MODERNS ON THE LAW-SOURCES.—*(Continuation.)*

When in relation to practice we speak of the proof of a customary law, thereby thinking of a case in which a party avails himself of that law, the question is, how the judge is to arrive at a conviction of it. A satisfactory answer to this question is however only possible by first examining the more general question, how generally, without reference to a judge, the knowledge of the existence and import of a customary law may arise.(a)

If we first think of the members of each society in which customary law has arisen and continuously lives and operates, (S. 7. 8.) the question answers itself; their knowledge is an *immediate* one because the very essence of that law rests on the common consciousness of law of those members. Thus far it may be said that each customary law rests upon notoriety.(b) Let it not be said that this proves too much because if so there could never be a dispute as to a customary law and proof could never be wanted. The whole matter is as to whom and in what scope anything is notorious. Nothing is more notorious in each people than the common language, and yet a foreigner who enters a country often does not understand a word of that language. So is it with the customary law as to those who stand without the circle of that common consciousness of law and whose knowledge therefore of the cus-

(a) Comp. generally Puchta Gewohnheitsrecht II. Bk. 3. cap. 3. 4.

(b) L. 36. de leg. (1. 3.) "Immo magnae auctoritatis hoc jus habetur, quod in tantum probatum est, ut non fuerit necesse scripto id comprehendere.

tomary law can be merely a MEDIATE or artificial one. Only we must not think as to this of foreigners only, since it applies, certainly to all minors and as to many legal principles also to women; therefore even within the people we must separate the knowing or skilled in customary law from those who take practically no part in the common consciousness, although their jural relations are none the less subject to the customary law. In truth the number of these skilled persons may greatly differ according to the contents of the individual rules and even according to the disposition and degree of culture of the people; persons so skilled in customary law are by no means to be regarded as jurists proper. The ancient German institution of the village courts (Schöffengerichte) which were composed of skilled persons, rested upon such a state of immediate recognition of the customary law.

It is now to be explained how the mediate knowledge of the customary law, the only one accessible to them, may arise in those who live outside the circle of those skilled in that law but who may be incited to the acquisition of it sometimes through their own interests and sometimes by a need of learning it, unconnected with self-interest. They may attain to this knowledge in the first place, through single cases of the usage of it and the qualities, which those acts of usage must have, to be adapted to such a purpose, have already been defined (S. 29.) In the second place—through the testimony of those who as skilled persons have an immediate knowledge. Such testimony may be sought and rendered for the transient need of a single, at that time important case; it may be deposited in records of which the activity is more extended and enduring.

Such testimonies for a single necessity of the present were the memorials (Weisthümer)(c) drawn up by the old courts. Such a procedure was not unknown to the Romans. Justinian had been petitioned to make a new law upon the *foenus nauticum*, or as we call it, bottomry. He ordered a functionary to examine upon oath as witnesses the persons, who practised this business, as to the rules observed in it and in accordance with their depositions, he promulgated a law by which the customs explored were in substance established.(d) However in our time, such an examination of the customary law may be occasioned by the need of an individual case, as will be presently shown when the duty of the judge in reference to a doubtful customary law is discussed.

To the records which prove a customary law for wider circles and future times belong first many Weisthümer which were not occasioned by the requirements of a single case. Further among such records are to be numbered in great part the old popular laws, the later law-books, the German city and country laws, the statutes of the Italian cities and the French coutumes. In truth written law is by way of extension often found intermixed in those heterogeneous collections; in especial they have in later times operated in the

(c) Eichhorn deutsches Privatrecht S. 5. 11. 26. Many might believe such a procedure possible only in times as simple as those of the old village courts, not in our time. England serves as an example to the contrary where they are accustomed to examine popular matters of all sorts, by the examination of practical persons of the most different orders. The forms in use there might be partially employed among us where the establishment of a customary law is in question.

(d) Nov. 106. Conf. Puchta I. S. 133.

same way as written laws proper, so that their original destination, of availing as recorded customary law, has fallen into oblivion.

It would be desirable that in the spirit of these collections of earlier times, care had in our day been taken for the diffusion and preservation of the existing customary law. This is the real task of the so called provincial statute books, which are distinguished from the general codes, especially by their not being concerned with the whole system of law but merely with matters with which their authors have some direct acquaintance, so that they have a complete thoughtful mastery over the object-matter. It is however perilous to treat such a work as something to be done at a glance, to be concluded like an ordinary business which must be promptly dispatched; it would be better if as something constantly progressing, independently growing, it is brought into connexion with the superior tribunals. In such a matter the entire success depends upon the right selection of the workmen, in which two possible kinds of one-sidedness may become pernicious—the preference for the centralisation and the uniformity of the law by which in truth the convenience of the judge and the inspection of the official machine will be much assisted; on the other side however an affection for the peculiar and the ancient as such. This affection is beautiful and good, but the precise truth is still finer and the care for the wants of the living present, is better still. If such a work is really to succeed, it must be undertaken in the same way as the Weisthümer were formerly composed; in particular a careful enquiry among persons not jurists is not to be despised, since in them a defect in scientific training will be often accom-

panied with the clearest knowledge of the essence of the jural relation itself.

From this general treatment of the different modes of attaining to a knowledge, we now pass on to the special situation of a judge who has to decide according to such a law. The following view is very prevalent on this matter. Customary law is a matter of fact like every other appertaining to the establishment of a right *e. g.* the existence of a contract or a testament. The judge accepts no matter of fact which is not alleged and proved by a party; hence no one can doubt that as to the burden of proof and the conduct of the proof in respect to the existence of a customary law the same rules apply as in respect to other matters of fact, as contracts and testaments. Many have in truth modified this view in the application of it and have thereby diminished its pernicious character; it should however much rather be entirely rejected.(e)

Each jural relation has a two-fold basis, one general and the other special. The former is the rule of law—the latter consists in the matters of fact which are the medium through which the rule is applied to the particular case (S. 5.) The rule of law the judge may and is bound to know *(jus novit curia)*; of the matters of fact he can and must know nothing until a party has alleged them and brought them to the proof. This contrast remains the same, let the rule of law have proceeded from written laws, customary law or science. That theory therefore rests upon an interchanging of the two foundations of the jural relation, since what is true only of the knowledge of the particular matters

(e) Puchta I. S. 105. II. S. 151. fg. Comp. also Lange Begründungslehre des Rechts Erlangen 1821.

of fact of the individual case, is transferred to the knowledge of the rule of law, the necessity remarked of proof according to definite rules of procedure is true of those matters of fact only and it is in order to denote this important peculiarity that we only call them *matters of fact,* when we use this expression in a technical sense. This expression consequently, as happens with every technical narrowing, is of an ambiguous nature and this ambiguity has originated or at least confirmed the confusion mentioned; for in a more general sense the arising of the customary law may of course be called a matter of fact and that is done by the advocates of that theory. If they would however be consistent in this matter, they must apply the same procedure to the written laws also; for the written law too rests upon the fact of the promulgation and the judge therefore must not apply any law, of which the existence and contents have not been stated and proved by a party. This however has never been asserted by any one, although written law and customary law considered from a general point of view, have on this matter exactly the same nature. If in particular it should be attempted to base the theory here explained, which may also have some truth in it, upon the Roman law, this could not be allowed since in fact the Roman law lays down no provisions as to the proof of customary law.

However a true element is contained in this fundamentally erroneous theory and we can only hope completely to remove the error mingled with it by recognizing this truth and confining it within its true limits.(g) Our legal condition has become an artificial

(g) Comp. Puchta Gewohnheitsrecht II. S. 165. foll.

one; we require from the judge a scientific study of law which must be proved by defined tests and by which his position becomes a wholly different one from that of the old popular judges (Schöffen.) These in each case bore witness to the law living in the people, of which an immediate consciousness dwelt in them as in all others, perhaps with the sole difference that by greater practice it did so more purely and completely in them, than in others. As on one side we require of the modern judge far more than was required of the ancient, we must on the other side depress our expectations. He is to decide with the aid of science not acquired without the expenditure of many powers, hence we cannot expect that, like the old popular judges, he will have obtained an immediate consciousness of law through the experience of life.(*h*) Hence it follows that our modern judge must have quite a different relation to the part of the law which has arisen from written law or science, from that which he bears to that which has proceeded from customary law. The written and scientific law, he may and must know and he violates his duty where he decides wrongly from unacquaintance with them; he is not so responsible in the case of the customary law. The party therefore, who wishes to secure that a rule of customary law should not to his damage be overlooked, must point out this rule to the judge and withal prove

(*h*) In truth this difference is partly grounded upon the circumstance that we have received a foreign law, which by its nature renders a scientific study necessary; it would however be erroneous to seek the main ground in this alone. The English have no foreign law but the mass of their Acts of Parliament and precedents, is so enormous, that the necessary study of them gives to the English judges quite a different character from that of the popular judges, just as among us the study of the Roman law does.

it to him; if he neglects the one or miscarries in the other, he must ascribe the loss to himself and in general no reproach attaches to the judge.

In this therefore consists the unmistakeable practical resemblance between customary law and true matters of fact proper; since these also must be alleged and proved. However this similarity is very different from an entire concordance since together with this similarity there subsist the following very important practical differences.(*i*) Facts a judge must never supply unless a party brings them forward; he must and will take notice of customary law when he has merely by accident a knowledge of it. Matters of fact must be brought forward at a definite period of the case and be proved according to the prescribed rules and forms of procedure; customary law may in any position of the case have an influence upon the decision, and upon the mode of receiving evidence of it, the judge has complete discretion. Customary law is in this respect exactly like foreign laws upon which the decision of many a case may be dependent. The knowledge of them is not required from the judge, and the party must allege and prove them, exactly as has been here observed of customary law therefore, without their being put exactly on the same footing as matters of fact proper.

If in a case customary law is relied upon the judge will proceed in obtaining a knowledge of it according to an unfettered consideration of the circumstances. He may derive his conviction from single cases of the using of a rule of law and the necessary quality of such cases has already been established above (S. 29.)

(*i*) Puchta II. S. 125. fg. S. 135. fg. He quotes other writers who approve of this procedure. Comp. above note (*c.*)

He may also examine upon its import such persons as have an *immediate* skill in customary law; these must then be regarded not so much witnesses as experts since they are not interrogated upon an object-matter cognizable by the senses.(k) It would not be right to regard this proceeding as an immediate application of the law of Justinian which speaks thereof (note (d)); since Justinian does not say what the judge is to do in order to learn a customary law, but what he himself has done, in order to prepare a written law corresponding with the customary law in a particular case. However in as far as the judge follows this example he acts certainly in the spirit of our written laws, and so far also the novel quoted may serve as a justification of this procedure. Suppose that the same rule of customary law, which is at present relied upon and disputed in a case, had already been made available in an earlier case and that the same or another judge after careful examination had recognized it as real, this earlier decision would be a weighty authority, an official proof as it were, by which the present new examination would be rendered much easier or completely dispensable with; and the more so that the contradiction of the opponent in that earlier case must have sharpened the attention of the judge who tested it. Hence Ulpian rightly advises the judge to institute an enquiry after such earlier precedents as to the customary law at present disputed.(l)

(k) Puchta II. S. 125. foll. He also cites earlier jurists who approve of this procedure—Comp. above note (c.)

(l) L. 3. 4. de leg. (1. 3.) "Cum de consuetudine civitatis vel provinciae confidere quis videtur: primum quidem illud explorandum arbitror, *an etiam contradicto aliquando judicio consuetudo firmata sit.* Comp. Puchta I. S. 96. II. S. 129. fg. Many have erroneously wished

We ought not however to forget that this somewhat anomalous treatment of customary law in comparison with other law-sources, is based not upon the nature of that law itself but on the unavoidable incompletenesses of our legal condition for which we are not responsible but must fill up as well as we can. Hence it is necessary to limit these anomalies, constantly regarded as *succedanea*, within as narrow bounds as possible. There can be no question of them first as to the customs belonging to the general law, since these have without exception passed through the medium of scientific working up and recognition and therefore bear on them no longer the popular character which is the ground of the difficulty here set forth. If therefore a party with the contradiction of his opponent asserts that a *nudum pactum* is a cause of action or that the *leges restitutae* in the Code as also the political principles of the Roman law have no validity in practice, these are really two propositions of customary law; but no judge will apply a process of proof by the searching out of single cases of the use of those propositions or by the examination of skilled witnesses upon them. By this it is seen that the application of those anomalies is confined to particular customary law, and they would fall out of use in this too, if, by the measures described above as desirable, precautions are taken for the collection and recording of the existing customary law in general. If such collections were made in our days, a doubt upon the rules could scarcely arise since the very collections will for the most part receive a statutory confirmation.

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to deduce from this passage the necessity of judicial decisions to the establishment of a customary law.

Lastly as to the operations of customary law, this law must be put on the same footing generally as written laws since this similarity was expressly recognized in the Roman law which has been admitted as the rule in this matter. In each single case of customary law the operation might display itself in two ways, according to whether for that very question of law, a written law was already in existence or not. In the latter case no difficulty arose because on that point, customary law indisputably enlarged the incomplete legislation. In the former case, when the customary law contradicted a written law, the principle of equality directed the preference always to be given to the newer of these two laws without distinction between written law and customary. On this matter, it is true, the L. 2. C. *quae sit longa consu.* has raised some doubt. However most have constantly allowed to customary law the power of modifying earlier laws and have merely asserted an exception in certain cases by reason of that text of the code.(m) In modern times however many have availed themselves of the following distinction between the question of the bare abolition of a written law by non-use *(desuetudo)* and the supplanting of it by a customary law which sets another rule in its place *(consuetudo obrogatoria.)* The latter is admitted without hesitation, but the first to be wholly rejected.(n) This distinction however is first not even in appearance based upon the text of the Code for, if they will take

(m) Comp. the appendix 2.

(n) The ample defence of this view is the aim of Schweitzer de desuetudine Lips 1801. In favour of the same view expresses himself Hübner Berichtigungen und Zusätze to Höpfner S. 159. The right view is very satisfactorily explained by Puchta Gewohnheitsrecht II. S. 199. fg.

this literally, both cases are alike rejected: further the customary law, which establishes a new rule *e. g.* increases or diminishes the punishment of a written law, just as much vanquishes the written law, as such a customary law as merely removes the penal law, since it makes the formerly punishable act not punishable. In the nature of customary law too, there exists no ground for this distinction. Something is to be sure concealing itself behind the expression *desuetudo* which has nothing to do with customary law viz. the non-application of a written law during a long period of time, because plainly no case had occurred for the application. In such an intermission no generation of law has disclosed itself and consequently no customary law can exist therein. This could rather only be admitted if such cases had actually arisen and nevertheless the application of the written law been intermitted. Then moreover there exists no ground in fact for admitting a smaller power against a written law of a genuine proper custom of not applying it, than of that custom which sets up another positive rule instead of the written law. Properly speaking that *desuetudo* may be so comprehended as that another rule is substituted by it. When *e. g.* the prohibition of compound interest is abolished as to running commercial accounts, there is in truth first of all a *desuetudo*: but this has the immediate consequence that in such cases the more general rule of law becomes applicable by which all contracts as to interest, not specially forbidden, are considered valid.

A modification of the operation is introduced when a particular custom is in conflict with the interest of the state or with an absolute general written law of

the land. All force must here be denied to the custom even when it is newer than the law and this principle follows not merely from the correct explanation of the text of the Code quoted but also from the nature of the relation of a single part of the state to the whole.(o) Thus for example a new law of usury must be generally applied, and no particular custom, let it have arisen before or after that written law, must hinder the application of it.

SECTION XXXI.

EXPRESSIONS OF THE NEW CODES UPON THE LAW-SOURCES.

The views of modern writers here explained could not remain without influence upon the codes which have arisen in our time and it is now to be stated how the law-sources are regarded from the stand-point of these codes.

The Prussian Landrecht, the oldest among them, first abolishes the whole common law hitherto prevailing and puts itself alone in the place of it: and this abolition was quite logical because all that was serviceable of the old law was to be admitted into the code.(a) For the future the mode is first defined in which laws are to be composed and promulgated.(b) This also was consistent because the Landrecht incorporated many portions of states-law; only these provisions were some time afterwards found quite insufficient and were replaced by others. The hitherto prevailing gene-

(o) Comp. the appendix 2.

(a) Publications patent S. 1.

(b) L. R. Einleitung. (S. 7—11.)

ral customary law was included in the abolition of the common law. The particular customary law was to be collected and within two years, so far as it was useful, put together beside the provincial statutes in the provincial codes. What was not admitted into them was only to have validity so far as the Landrecht in single passages refers to local customs or should be enlarged by them.(c) As to the future arising of a new customary law, nothing is determined; doubtless this was merely permissible on the two alternative pre-suppositions mentioned, therefore merely as particular customary law. Lastly on scientific law it is said "no reference is to be made in future decisions to the opinions of jurists or former expressions of judges."(d) By the expressions of judges certainly precedents and not decisions having the force of *res judicata* are meant, although the expression might be referred to both sorts of operation. That to these, as to the opinions of jurists, no regard is to be paid, has certainly only the sense that no force binding and similar to that of statutes shall be ascribed to them, since in truth no law can prevent the influence of them upon the view and conviction of the future judge, therefore the perhaps unconscious regard to them.

The French code, just as logically contains no direct determination upon these object-matters because it does not in general extend to the public law. The abolition, of the hitherto prevailing foreign law, of the royal ordinances, as well as of the local laws, was expressed in a special written law.(e) The code itself contains merely

(c) Publikation's patent S. 7. L. R. Einleitung S. 3. 4.

(d) L. R. Einleitung S. 6.

(e) Loi du 21 Mars 1804 "à compter du jour ou les lois composant

the important indirect determination that no judge must refuse his decision by reason of the obscurity or incompleteness of the laws.(*f*) This is a direction to the judge in such a case to help himself how he can; against the misuse of this right the court of cassation is a protection, so that in this also a system consistently carried out is perceptible. The code besides in some few doctrines (servitudes and letting and hiring) refers to local customs and regulations.(*g*) Of the future generation of law nothing is said: doubtless however it is intended that a general customary law should not arise in future, a particular one merely in the few cases in which the code even now refers to local customs.

The Austrian code embraces the abolition of the common law and of customs also by name in the patent of introduction of 1811. In the code itself nothing is determined as to legislation for it is entirely limited to private law. Customs are only to avail in the matters on which the code refers to them. Of judicial decisions it is merely said, that they have not the force of a written law and that they cannot be extended to other cases or persons.(*h*)

Of all these determinations the least important are

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le code civil sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts et reglements ont cessé d'avoir force de loi générale ou particulière dans les matières qui sont l'objet de ces lois." Coutumes générales ou locales means not at all general or particular customary law but provincial or state law without the distinction of written or unwritten. Customary law is called usage.

(*f*) Code civil art. 4.

(*g*) Code civil art. 645. 650. 663. 671. 674. 1736. 1754. 1758. 1777—Art. 1135. 1159. 1160 only have the appearance of belonging to this place.

(*h*) Austrian Code. S. 10. 12.

those which concern legislation, since what is important in this matter is dispatched elsewhere and not in the general code; it is the same with what concerns customary law because this sort of law-forming, in so far as it is conceived as purely popular and independent of the scientific law, scarcely presents itself in modern times. Important on the contrary is the relation in which, in each of these states, the particular is placed to the general law. This however is beyond the scope of our treatise. The most important of all is the relation of the codes to the scientific law, that is to say, on the one side—the continuing influence of literature and the practice of the courts; on the other—the mode in which the new law is to be received and worked-up by the order of judges; and by no means how this relation is expressly determined in the codes, since this is little or not at all, but how it was thought of, expected and prepared for and what it has in fact become. A remarkable difference is shown in this matter (S. 21.) In Prussia the whole reform had no political motive but simply the pure benevolent aim of improving a faulty condition and of putting something truly good in place of it. The most perceptible evil was connected with the condition of the juristic literature. In this were found indeed learning and a spirit of enquiry, therefore much good material but little coherence; and in particular the practical part of legal science had lagged behind the general culture of the time and had ceased to be respected. It seemed advantageous, even necessary, that the connexion with this literature should entirely perish. It is therefore manifest that thoughts similar to those, which Justinian once cherished, lay at the foundation of the whole undertaking (S. 26.), merely with the difference which necessarily resulted

from the freer and more intellectual condition of our time. For that reason no attempt was made at a similar suppression of all science. A new jurisprudence was rather to spring from the new code as a basis; to this the great fulness and the very teaching tone of the code were directed. The negative part of this expectation was immediately fulfilled since the connexion with the earlier jurisprudence has in great part disappeared. A new legal science however seemed for a period of forty years not willing to arise. A few years ago, for the first time a remarkable activity has been developed in this department which authorizes the happiest expectations. To what extent the proper aim of the new legislation, that of exclusively and completely governing practice has been attained, would only be determinable by a comparison of the views prevailing in the individual courts; for such a comparison however literary material has been for a long time wanting. Meanwhile an excellent beginning has now been made in furtherance of this end.(i)

It was far otherwise in France (S. 21.) Their having found the state of law bad or intolerable was not the motive to the new legislation, but it appertained to the natural developement of the Revolution. Its effort was especially directed to the destruction of the old historical relations, and especially the difference of the provinces, and this levelling dissolution of all local differences in an indivisible France was now to be effectuated also in the department of private law; that was the main object of the code. Now before the Revolution the theoretical part of legal science had

(i) Simon and Strumpff Rechtssprüche preussicher Gerichtshöfe. Berlin 1828. fg. 8.

stood much lower than in Germany, the practical part on the contrary higher. Judicial eloquence, the connexion with the social culture of the great capital, the lustre and influence of the Parliament, had all worked together to a higher cultivation in the order and activity of judges and advocates and by this also had preserved for them remarkable respect. By the composition of the code they did not intend to destroy the jurisprudence which had thus arisen; they rather counted upon its undisturbed continuance and this presupposition may have been the very reason of their often making such short work of the most important institutions of law. The practical result however entirely harmonizes with the supposition. The new juristic literature stands in such unbroken connexion with the earlier that one would hardly believe that between them lies so important a fact as the appearance of a code. Indeed there is perhaps no side of public life in France, which has been fundamentally so little shaken and changed, as the administration of private law.

Thus in this matter also, the different spirit of the nations with their special excellences and weaknesses is verified. Certainly therefore those, upon whom the supreme leadership of each of them is incumbent, will do well to think of their special want and at the same time to take notice of the powers to be counted upon in them for the effecting of great things. To descend to particulars—in Germany it would not be advisable to leave to itself the developement of law in a way similar to what happened in the middle ages and even later, and to that in which modern practice arose. On the other side it would be just as little advisable that this matter should be looked after by the highest functionaries (in short the ministry of justice) according to the

customary official mechanism which requires that every current matter should be dispatched as well as it may. It is rather to be recognized that the end cannot be attained by science alone, just as little however by practice alone, but only by the two being connected and pervading each other. This might happen in each large state by a written law commission formed of scientific jurists and experienced practitioners who should be in constant active connexion with the superior courts and must through these collect the experiences of the law occurring in life. By means of such a contrivance would be done consciously, and therefore with greater success, what in the earlier centuries was done unconsciously. This contrivance would effect, with an entire difference of external form but similarly as to inner nature, that developement which was effected in the Roman law by the annual revision of the Praetorial edict. However this observation is only applicable to that developement of law which is effected by the organic power dwelling in it, therefore by unfolding from within (S. 7.) Much too may in this way be conveniently and satisfactorily accomplished, which must otherwise devolve on legislation (S. 13.) That this position is no mere arbitrary invention but verified by experience and in the main, (though often without clear consciousness) recognized is proved by the example of such countries as England and France in which the right of legislation is exercised by the artificial co-operation of different powers; since however often these single powers show their jealousy of every diminution of their share in that important right, that tacit formation of law still exists in them, so much out of the region of possible dispute, that those powers

have left it undisturbed. Only whenever a new determination of law presents special political relations, it of necessity devolves upon the rigid form of legislation; still more so however where the law is changed in so comprehensive and decisive a manner as is done in the code Napoleon.

CHAPTER IV.

INTERPRETATION OF WRITTEN LAWS.

SECTION XXXII.

CONCEPTION OF INTERPRETATION.

DIVISION INTO LEGAL AND DOCTRINAL.

Up to the present point the contents of the law-sources have been regarded as the independent rule of law—consequently as a something given *(datum.)* If this rule is to pass over into life it is necessary that something should be done on our part, that we take it upon us in a definite manner. This reception may lead to the most various applications—in the jurist to the cultivation of science in multifarious forms—in the judge to decisions and their execution—in the individual to the direction of his life-relations in a definite shape. The peculiarity of such special developements is foreign to our task; as common to them all however, a definite way of accepting the contents of the law-sources lies at the basis and this common foundation is to be explained in the present section.

That which is required on our side is an intellectual activity, therefore, however simple it may often appear, a scientific employment, a beginning and foundation of legal science. This was spoken of above as a principle co-operating in the generation of law; here however it appears in a reversed way inasmuch as it takes up and brings to definite consciousness the law which has arisen independently of it.

Such a taking up of the law is conceivable and necessary as to all the sorts of law-sources. However as to the customary and the scientific law, it is a work of a simpler nature. Upon the nature of these kinds of origination of law very influential errors exist with which we have dealt above. If these are recognized and avoided, the intellectual task does not need an explanation going into details. It is otherwise with the written laws in which in fact this task is often of a very complicated character. On this ground the present section has received the special designation of THE INTERPRETATION OF WRITTEN LAWS.

The free intellectual activity embraced in the task may be defined as the recognizing of the written law in its truth, so far that is, as its truth is cognizable by the application of a regular procedure. It is necessary to each written law, if it is to enter into life, and in this its general necessity, lies likewise its justification. Its applicability is not at all, as many suppose, conditioned by the wholly accidental circumstance of the obscurity of a written law (S. 50.) It may of course become, in consequence of that obscurity, especially important and fruitful in consequences; but that quality of the law is an imperfection and it is necessary to set out with the examination of the healthy condition that we may find safe counsel as to the faulty condition. On the other hand however that activity is likewise not at all excluded by a high degree of obscurity.(a) We must rather assert that, in accordance with the general nature of the judge's office, the obscurity of a written law ought never to deter him from forming a definite opinion upon the

(a) The connexion of this opinion with the directions of the Justinianean law can only be rendered clearer below. Comp. S. 48.

import of the law and from pronouncing a decision accordingly. For the facts of a case may also be in the highest degree doubtful, without the judge for that reason being allowed to refuse his decision. Between the two elements of the decision, the rule of law and matters of fact, there is indeed in this point of view no essential difference. The express prescription of the French law therefore, which forbids the judge to refuse his decision, by reason of a defective, obscure or insufficient law, is quite in conformity with the general nature of the judge's office.(b)

In one case however that unfettered activity is entirely excluded: when namely the meaning of one law has itself become again the object of a new rule of law. If therefore it is determined by a new written law or even by a genuine customary law, how the older law ought to be understood, that free activity is entirely excluded, and the older law must be conceived and applied in the sense prescribed even by one who may be, so far as he is concerned, convinced of the incorrectness of this interpretation. The moderns call this, according to whether it rests upon a written or a customary law,(c) the AUTHENTIC and USUAL INTERPRETATION both together the LEGAL, which they oppose to the DOCTRINAL or in other words the above described unfettered or scientific activity. The mode of conception, which is the basis of these technical expressions, is so far right when one looks only at the final aim,

(b) Code civil art. 4.

(c) This interpreting customary law will always immediately take upon itself the nature of the scientific law (S. 14—20.) For a general consciousness of the people, which should have for its object-matter a particular written law, is only conceivable in very rare cases.

that namely of recognizing the contents of the written law. Then every means to this end is called interpretation and this conception moreover underlies the division now mentioned. When one on the other hand looks at the essence of the process, he must necessarily set out from the conception of interpretation above set forth since this is presented as the general and necessary one by the very destination of the written law; since every written law is to enter into life, which is at first only possible through intellectual conception of it, it can certainly not be regarded as the natural condition that each written law should be succeeded by another determining its meaning; indeed if this event were natural, a free activity would at first, up to the appearance of the new law, be indispensable. If one now proceeds from the fundamental conception of interpretation as a free activity, the so called legal interpretation does not appear as a co-ordinate species of the same genus but rather as a pure contrast, as the exclusion or inhibition of that free activity altogether. And this conception proves itself to be the right one, because in it the true and undeniable relation of the rule and the exception stands out in the most distinct manner. Hence from this time the so called doctrinal interpretation will alone be understood by interpretation in general. Modern writers have in truth in this matter entirely reversed the relation of rule and exception. All interpretation, it has been asserted, is according to its nature a sort of legislation and can only be confided to individual officials or even to private hands, by delegation the part of the supreme power.(d) This assertion is connected with other representations of modern writers, according to which interpretation does not

(d) Zachariä Hermeneutik des Rechts Meissen 1805. S. 161—165.

remain within the limits of a pure genuine comprehending of the written law but in fact becomes a modifier of it; this may properly be more fully spoken of lower down.

Interpretation is an art, and education for it is furnished by the admirable models of ancient and modern times of which we possess a great wealth. More defective is that which up to the present time has been expounded as the theory of the matter. This inadequacy of the theory heretofore received is accidental: it is however important that one should not delude oneself as to the general value of any theory, even of the best; for this art, just as little as any other whatever, admits of being imparted or acquired by means of rules. We can only by the examination of excellent models explore wherein their excellency lies; hence moreover we shall sharpen sensibility to that on which every interpretation depends and learn to direct our efforts to the right point. This and the avoiding of many possible wrong roads is what in this, as in every art we must hope to obtain by the theory.

We shall again have to enter upon the important question whether the directions of the Roman law upon interpretation are of binding force where this law prevails. This question was above stated and answered in the negative as to the developement of the law itself. Here it concerns the bearing of the single law to the sources and hence the two questions, although unmistakeably related, may nevertheless receive a different answer. However an exhaustive answer to the question is not yet possible in this place. For this reason the expressions of the Roman law will be quite provisionally used in the exposition of this doctrine; it

will however in the meantime remain quite undetermined whether they are to have the force of binding laws or merely of a weighty authority.

The task of this chapter has two parts: first the interpretation of the isolated laws, then that of the circle of sources as a whole. Since this is destined for the complete domination of law, a unity as well as an exhaustive whole must be found in it. The first requirement makes it necessary to remove all contradictions, the second to fill up all gaps.

SECTION XXXIII.

A.—INTERPRETATION OF SINGLE WRITTEN LAWS.

FUNDAMENTAL RULES OF INTERPRETATION.

Every written law is destined to the establishment of the nature of a jural relation, therefore to the expression of any thought whatever, be it simple or complex, by which the existence of that jural relation may be protected against error and arbitrariness.

If this end is to be reached, those who come into contact with that jural relation must conceive that thought in its purity and completeness. This is done by their in thought placing themselves upon the stand-point of the legislator and artificially repeating in themselves his activity, that is causing the law to originate again in their thought. That is the business of interpretation which we may therefore define as the reconstruction of the thought(a) dwelling in the law. In this way only is it possible to obtain a sure and

(a) I use the word THOUGHT because I find it express in the most definite manner the intellectual import of the law. Others use, not less properly, the expression SENSE. On the other hand, OBJECT is to be

complete insight into the meaning of the law and only by this means is the aim of the law to be arrived at.

Thus far the interpretation of written laws is not different from the interpretation of every other thought embodied in expression as is done in philology for example. That, which is peculiar to it, is shown however when we separate it into its constituent parts. Thus we must distinguish in it four elements; a grammatical, logical, historical and systematic.

The grammatical element of interpretation has for its object-matter the word which is the medium of the transition from the thought of the legislator to ours. It therefore consists in the explanation of the phraseology used by the law-giver.

The logical element depends upon the dismemberment of the thought, therefore upon the logical relation in which its several parts stand to one another.

The historical element has for its object-matter the condition of the jural relation presented, as determined by the rules of law, at the time of the written law in question. Into this condition the written law is to enter in a defined manner and that element will bring to view the nature of this entrance—that which by this written law has been newly inserted in the law.

The systematic element lastly is concerned with the innate connexion in which all the institutions and rules of law are bound up into a great unity (S. 5.). This connexion, as well as the historical, was likewise in the

avoided, because it is ambiguous since it may also have reference to the aim of the law lying outside its contents upon which the law will have an influence. The Romans use interchangeably the expressions *mens* and *sententia*.

eye of the legislator, and we can only then therefore completely understand his thought, when we make clear to ourselves in what relation this written law stands to the entire system of law and how it is practically to enter into the system.(b)

Through the medium of these four elements the insight into the import of the written law is accomplished. They are not therefore four species of interpretation, among which one may select according to taste and pleasure but they are different modes of activity which must work in unity, if the interpretation is to be reached. In truth sometimes one and sometimes another will be more important and stand out more visibly so that the constant direction of the attention to all these sides is indispensable, though in many single cases the express mention of each one of these elements may be passed over as unprofitable and awkward, without danger to the thoroughness of the interpretation. The success of every interpretation is dependent upon two conditions in which the four elements may be shortly summed up: first that we have present to us in a life-like manner, the intellectual activity from which the expression lying before us has sprung. Secondly that we have in adequate readiness the intuition of the historico-dogmatic whole, from which this individual can alone receive light, so as immediately to perceive the relations of that whole,

(b) The systematic element is also an essential indispensable part of interpretation. In the numerous existing commentaries upon the Justinianean law books, in which we might particularly expect it, by far the smallest is to be regarded as genuine interpretation. They are for the most part discussions of a dogmatic, at times also of a historical kind, which merely use the text commented upon as an opportunity for expressing their opinions upon the positions of law touched upon.

to the text lying before us. By reflecting upon these conditions, the strangeness of many an appearance, which might easily perplex us as to the correctness of our opinion, is lessened. We not seldom find for example among learned and celebrated jurists interpretations of an inconceivable perversity, while intelligent learners, to whom we present the same text, often hit the right one. We especially have experiences of this kind in the numerous cases of which so large and instructive a part of the Digest consists.

The aim of interpretation with respect to every law is precisely the gaining from it as much practical knowledge of law as possible.(c) This result may be attained in various degrees and this diversity is dependent partly upon the skill of the interpreter, partly however on the skill of the legislator in laying down in the written law much of sound legal knowledge, consequently in governing the law as much as possible on the particular point. In this matter therefore there exists an interchanging between apt legislation and apt interpretation so that the success of the one is conditioned and secured by the other.

SECTION XXXIV.

GROUND OF THE WRITTEN LAW.

If then the task of interpretation is to bring to consciousness the contents of the written law, that which is no part of these contents is, however closely

(c) The name interpretation (explicatio) is especially fitted to express this aim of the proceeding because it results from it, that that which is included in the word, is dragged to light and thus made public. The name clearing up (explanation) on the other hand, means rather that the condition (accidental) of unclearness is removed and changed into clearness and therefore less denotes the general nature of the occupation.

related to them, strictly speaking, beyond the limits of the task. Even the examination into the ground of the written law *(ratio juris)* is thus excluded. The idea of this ground has often been very differently conceived through its having been sometimes placed in the past, sometimes in the future. According to the first view, the already existing more general rules of law, of which the logical carrying through has led to the present written law, are to be regarded as grounds. According to the second view, the practical effect, which is to be produced by the written law, is to be so regarded, so that from this stand-point the ground is also designated the AIM or INTENTION of the law. It would be erroneous to conceive these two views, in absolute opposition. It is rather to be recognized that the two relations of his thought have been constantly present to the legislator. A relative difference however in truth lies in the fact that sometimes one, sometimes the other, of the relations may be preponderant in particular laws. In this connexion the difference between normal and anomalous law above explained (S. 16.) is especially influential. In the normal law *(jus commune)*, the reference to the already existing rules of law, which are here to be more fully developed, will for the most part predominate; the aim is merely the general one that the law may be more definitely known and more certainly applied. In the anomalous law *(jus singulare)* on the contrary, the reference to what is to be attained in future is predominant; thus *e. g.* the oppression of poor debtors is to be guarded against by the usury laws, and the motive cause is simply the general maxim of interposing with a sort of tutelary regard, when by certain transactions the welfare of whole classes is imperilled.

The knowledge of the ground of the law may be more or less certain. The highest certainty is secured by the actual expression of it in the law itself. However even in this case the ground remains distinct from the contents of the law defining the right, and must by no means be regarded as a part of it. Similarly on the other hand the force of the law is not at all removed by the entire want of a ground known to us; even when we know definitely that the written law has had no particular ground, a case to be presently treated more at large, the binding power of the law is not thereby lessened. A particular sort of uncertainty arises from the existence beside one another of several grounds of which the mutual relation may be doubtful; further from the possibility of the non-expression as to a ground in itself certain (perhaps expressed in the law), of the middle terms between the ground and the import of the law, by which perhaps an apparent difference between the two may be explained and justified.(*a*)

In like manner there are also different degrees in the relationship of the ground to the contents of the law. They may stand to one another in the simple, purely logical, relation of cause to effect; then the ground of the law appears as identical with the contents.(*b*)

(*a*) The Sc. Macedonianum was intended to obviate usurious transactions, with children under the paternal power, endangering the relations of family. The prohibition was however much more generally expressed so that many innocent cases fell under it because it would otherwise have been impossible to reach with certainty, the cases actually meant.

(*b*) L. 13. S. 1. de pign. art. (13. 7.) determines the degree of the culpa for the contract of pledge; this determination is a mere consequence of the more general rule of law contained in L. 5. S. 2. commodati (13. 6.) In the same way as to several other contracts mentioned.

In other cases on the contrary, they stand widely apart from one another.(c) The two cases will here be distinguished by the names SPECIAL and GENERAL grounds. These concepts however are relative; a sharp limit does not exist between them and they are rather to be thought of as very gradually transitional.

The use of the ground of the law is in the first place unhesitating and important where the matter at issue is the determination of the nature of the rule of law contained in the written law: viz., whether it is an absolute or mediate rule, likewise whether it must be regarded as *jus commune* or *singulare* (S. 16.) Much more doubtful and permissible only under great precautions, is the use of the ground of the written law in the interpretation of written laws; this use is especially dependent upon the different degrees of the certainty and relationship of the ground in the sense in which these differences have been already exactly explained above. The special determinations on this matter can only be more fully given below.

There are consequently numerous differences as to the grounds of the law to be remarked here: in the sort of the relation to the contents, in the certainty, in the affinity to the contents, and in the applicability.

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in the same place *e. g.* the *depositum*. A like application, to that in the case of depositum, would have been conceivable as to tutelage since the guardian also derives no profit from his administration. Here however the purely logical relation is destroyed by the influence of other grounds, so that here also the previously mentioned relation of concurrent grounds enters, and indeed this relation of the different grounds to one another is so circumstanced that they cut across one another.

(c) The more general rule of law upon the culpa rests upon a principle of the *aequitas* of which the recognition and limitation, are themselves uncertain and the application of it to a particular case, is very remote.

However beside these differences there exists this in common, that they have constantly a relation to the essence of the contents of the law or in other words an objective nature proceeding out of the thought of the legislator. They are by this their very nature recognizable by every one and we can merely regard it as accidental when they remain concealed from us. They stand in broad contrast to those matters of fact which have a merely subjective relation to the thought of the legislator and into these recognizability by others enters just as accidentally as it does naturally in the grounds of the law and can only by accident fail. To this class of subjective facts belong such events as have given the impulse to a law but which might in the same manner have led to rules wholly different;(d) likewise the often wholly individual and transitory actions, for the sake of which the legislator has established a permanent and generally operating rule.(e) To such subjective relations we must wholly deny the very limited use which we have admitted to the grounds of law. Merely the negative use may be made that the absence of any real ground of the law is often clear from them: thus they may serve to protect us against the erroneous admission of such a one.(f)

(d) Thus *e. g.* the delinquency which gave occasion to the Sc. Macedonianum. L. 1. pr. de Sc. Maced. (14. 6.)

(e) Thus *e. g.* under Claudius the law which gave liberty to marry a brother's wife merely that the Emperor might take Agrippina the daughter of Germanicus in marriage.

(f) These subjective relations are commonly not sufficiently distinguished from the ground of the written law to which the vague expressions MOTIVE-CAUSE, OCCASION, OBJECT, have not a little contributed. Hufeland Geist des Römischen Rechts Th. 1. Giessen 1813. S. 13—19. seems at the least, inaccurate in this matter.

SECTION XXXV.

INTERPRETATION OF DEFECTIVE LAWS—THEIR SPECIES AND MODE OF REMEDYING THEM.

The principles of interpretation stated may suffice for the healthy condition of the written law, since the expression exhibits a thought in itself complete, and no circumstance exists to hinder us from recognizing this thought as the real purport of the law. The difficult cases of defective laws are still to be exhibited and likewise the modes of remedy to be stated by which these difficulties may be removed. The conceivable cases of defective laws are the following:

I. Indefinite expression which guides to no complete thought.

II. Erroneous expression in that the thought absolutely denoted by it is different from the actual thought of the law.

In these cases a different degree of necessity is visible; for the removal of the former defect is as free from risk as it is plainly necessary; the second carries with it much greater risk and at least makes especial caution necessary.

Before however these cases are particularly explained it is necessary also to mention the means of remedy which must be employed in the treatment of them.

The first consists in the innate connexion of the legislation, a second in the connexion of the written law with its ground; a third in the intrinsic value of the import derived from the interpretation.

A.—Innate connexion of the legislation. This can be in two ways made use of as an expedient of interpretation in defective laws. First in so far as the

defective part of the law is explained by another part of the same law, which is the safest of all modes of explanation(a): Secondly by the explanation of the defective law by other laws.(b) This last sort of interpretation will be the more certain, the nearer the two laws stand to one another, the most certain therefore where both proceed from one and the same legislator. However the other laws, made use of for explanation, may be older than that explained by them, wherefore at the base of this procedure lies the correct assumption, that the author of the law now to be interpreted, has had before his eyes the older laws and that they have been therefore a complement of his thought.(c) The laws so used for the explanation may lastly be also newer: only this case will more seldom occur in the province of pure interpretation. When it does, such newer laws will in most cases stand to the defective one in the relation of a modification or at least of an authentic interpretation (S. 32.) which is no longer genuine interpretation. Where this process presents itself as pure interpretation, it rests upon the assumption that the mode of thinking of the earlier legislator, has also been preserved in the later legislation.(d)

(a) L. 24. de legibus (1. 3.) "Incivile est nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere.

(b) This sort of interpretation of the single defective law by the help of another is not to be confounded with the reconciling of contradictions which belongs to the treatment of the circle of sources in their entirety. This matter will first be fully treated below (S. 42—45.)

(c) L. 26. 27. de leg. (1. 3.) "Non est novum, ut priores leges ad posteriores trahantur.—Ideo, quia antiquiores leges ad posteriores trahi usitatum est, et semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas et ad eas res pertinerent, quae quandoque similes erunt."

(d) L. 28. de leg. (1. 3.) "Sed et posteriores leges ad priores pertinent nisi contrariae sint." Here merely the case of changing, as excluding the

B.—The ground of the law may likewise be an auxiliary for the interpretation of the defective law but not so unconditionally as the connexion of the legislation. Its applicability is rather dependent upon the degree of the certainty with which we know it and upon the degree of its relationship to the contents. (S. 34.). If one of these considerations is unfavorable, it may still be almost always applied to the removal of the first sort of defects, (indefiniteness) less frequently however to that of the second (the erroneous expression.)

C.—The intrinsic value of the result is lastly the most questionable of all remedies because by the employment of it the interpreter will, as easily as possible, overstep the limits of his occupation and intrude upon that of the legislator. Hence this remedy can be merely applied to the indefiniteness of the expression, not to the reconciliation of the expression with the thought.

A gradation is therefore again perceptible in these remedies like that in the defects themselves. The first is to be at all events unhesitatingly applied: the second makes greater caution necessary; the third lastly can be permitted only within the narrowest limits.

SECTION XXXVI.

INTERPRETATION OF DEFECTIVE LAWS.—(*Continuation.*) INDEFINITE EXPRESSION.

The indefiniteness of expression which makes it impossible, by means of it alone, to recognize any

use for interpretation, is denoted. However it is manifest that in the case of authentic interpretation, we do not accept the meaning of the earlier legislator as explained by the later law because we hold the explanation to be true but because the later law prescribes it.

complete thought whatever may be at once conceived in two ways: as INCOMPLETENESS or as AMBIGUITY.

The INCOMPLETENESS of the expression of the law is similar in nature to a sentence begun and broken off, so that for the complete thought the indication has remained uncompleted. This case happens *e. g.* when a law requires witnesses to a transaction without determining the number of them.(a) More frequent and more important is the case of ambiguity, which again may appear in different shapes—as ambiguity of the single expression or of the construction.

The single expression may relate to an individual object-matter and a term be used which suits several individuals—a case which will happen oftener in legal transactions than in laws.(b) It may however also have an abstract idea for its object-matter and here again the ambiguity may lie in the expression chosen having entirely different meanings(c) or in its having a narrower and a wider meaning.(d)

(a) Thus in Nov. 107. C. 1. Just so when a sum of money is to be determined and either the number or the sort of coins is not expressed. This case is mentioned, not as to laws but as to testaments in L. 21. S. 1. qui test. (28. 1.)

(b) *Examples*—L. 21. S. 1. qui test (28. 1.) The slave Stichus is bequeathed, Titius named as legatee while several bear these names L. 39. S. 6. de leg. I. (30. un.) The Cornelian farm is bequeathed when the testator had among his property several of this name.

(c) Thus the expressions familia, puer, potestas have wholly different meanings L. 195. 204. 215. de V. S. (50. 16.) Remarkable cases of this ambiguity are found in L. 5. C. fin. reg. (3. 39.) and L. 30. C. de j. dot. (5. 12.) In the first praescriptio may mean: Exception or Precept according to many also Limitation. In the second the words "si tamen extant" may denote if they are not destroyed or also if they are not alienated.

(d) Such narrower and wider meanings appear in the expressions

The ambiguity of the construction may also make the sense of the law doubtful and although this occurs more often in legal transactions, it is not without example in laws.(e) Different as the forms of the defect here explained may be, they still have in common with one another, that each of them hinders us from recognizing any complete thought whatever in a law with this quality. The origination of this fault may be founded upon a thought not clear or upon an incomplete mastery over the expression or upon both circumstances at once. To the interpreter the cause of origin is indifferent since the necessity of a remedy for the defect is always equally pressing and inevitable, because in its present shape the law is inapt to the establishment of a rule of law. The knowledge of this necessity is also completely certain since it is attained by a proceeding of logic; for that very reason however its office terminates with the clear insight into the nature of the existing doubt, and does not at the same time include its solution. This must rather be sought elsewhere and the three classes of remedies already stated serve for that purpose (S. 35.). They are all applicable to the purpose and consideration as to their difference of value is confined

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cognatio, pignus, hypotheca, adoptio (L. 1. S. 1.) de adopt. (1. 7.), familia (L. 195. de V. S. 50. 16.) In like manner the contract ne luminibus officiatur may equally well apply to the present state of things alone and to the present and the future. (L. 23. pr. de S. P. U. 8. 2.) Interpretation according to a wider or narrower signification is commonly called *lata* or *stricta*: every interpretation for the removal of an ambiguity *declarativa* Thibaut Pandekten S. 48. 50. 53.

(e) The explanation of the difficult L. 2. de div. temp. praescr. (44. 3.) simply depends upon whether the closing words "mihi contra videtur" are to be considered in connexion with the whole text or merely with a part of it. Examples of ambiguous construction in legal transactions are found in Mühlenbruch 1. S. 59. note 1.

to the question, when one class is to be employed in preference to the others.

First therefore wherever it is possible to remove the indefiniteness by bringing the legislation into connexion and where this means suffices, every other will be excluded as less secure and likewise as superfluous.

Secondly the ground of the law is to be applied to this purpose, and wherever possible the special ground immediately connected with the contents of the law (S. 35.) if we are able to establish such a ground. If this fails us a more general ground is permissible. Thus *(e. g.)* when the contents of the law rest in a mere general way upon *aequitas*, which must be completely assumed of the normal law (S. 16.) of the modern age, then of two, in themselves possible, explanations, that must be preferred which is justified by this *aequitas*.(*f*)

(*f*) In this way L. 8. C. de jud. (3. 1.) A. D. 314, is to be understood "Placuit in omnibus rebus praecipuam esse justitiae aequitatisque [scriptae] quam stricti juris rationem." That is: when in ambiguous law, the one explanation corresponds to the rigid law, the other to the *aequitas*, the latter shall have the preference, (praecipuam esse rationem.) L. 1. C. de leg, (1. 14.) A. D. 316, is apparently in contradiction. "Inter aequitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere." The hypothesis, that L. 8. cited sets out older and L. 1 cited newer law, that this therefore antiquates that, is highly improbable, since both fall within Constantine's reign and there are only two years between them. In order to remove the contradiction some have introduced into L. 8. cited the reading scriptae (an aequitas recognized by a written law.) This reading is contained independently in the old editions of Chevallon (Paris 1526. 8.) and of Haloander but is to be entirely rejected on internal grounds. Donellus (1. 13.) explains L. 8. as a mere restriction, L. 1. as an entire abolition of the rigid law by aequitas: there is no indication of this distinction in the text itself. The contradiction would be at once removed if one applied L. 1. cited solely to the correction of the expression by the thought (37.) which, by way of mere equity, was not permitted to the judge; but

Thirdly and lastly the indefiniteness may be removed by a comparison of the intrinsic value of the contents which, according to the one and the other in itself possible interpretation, is ascribed to the law. Thus *e. g.* when the one explanation leads to an empty aimless interpretation, the other not.(*g*) In the same way when the result of the one explanation is more in conformity with the aim in question than the other.(*h*) Finally when the one interpretation produces a more liberal, beneficial result than the other.(*i*)

SECTION XXXVII.

INTERPRETATION OF DEFECTIVE LAWS.—(*Continuation.*)

(ERRONEOUS EXPRESSION.)

The second conceivable fault of a law, consists in the incorrectness of the expression, in that it immediately

I believe that the text is not to be understood of interpretation at all, but of developement of law; the expression interpretationem does not stand in the way of it.

(*g*) L. 19. de leg. (1. 3.) "In ambigua voce legis ea potius accipienda est significatio quae vitio caret."

(*h*) L. 67. de R. J. (50. 17.) "Quotiens idem sermo duas sententias exprimit ea potissimum excipiatur, quae rei gerendae optior est. L. 3. de constit." (1. 4.) embodies an application of this rule "Beneficium Imperatoris quod a divina scilicet ejus indulgentia proficiscitur, quam plenissime interpretari debemus."

(*i*) L. 192. S. 1. de R. J. (50. 17.) "In re dubia benigniorem interpretationem sequi non minus justum est quam tutius." L. 56. 168. pr. eod.—L. 18. de leg. (1. 3.) "Benignius leges interpretandae sunt quo voluntas earum conservetur." The concluding words may mean; since that is the general will of the legislator. This explanation however appears to me more correct: provided that it is not to contradict the meaning definitely expressed in it (therefore quo for quatenus.) Single applications of this rule: In laws expressing punishments ambiguously the milder prevails. (L. 42. de poenis 48. 19.) In testaments inheriting is to be favoured, disinheriting not. (L. 19. de lib. et posth. (28. 2.)

denotes a defined and applicable thought, but such a one as is different from the actual thought of the law. In this internal contradiction of the elements of the law, the question arises; to which of them are we to give the preference? Since now the expression is a mere means but the thought the end, it is unquestionable that the thought must be preferred, the expression therefore corrected according to it.(a) The admission of this rule presents no difficulty; the application of it on the other hand may be very difficult since all depends upon the matters of fact here presupposed being brought to a certainty.

The cases of this sort exhibit much less variety than those of the indefinite expression (S. 36.) Their difference is referable merely to the logical relation of the expression to the thought owing to the possibility of the expression embracing more or less than the thought. In the first case the correction is made by an EXTENDING, in the second by a NARROWING, interpretation.(b) The end of both is merely to bring the expression into harmony with the actual thought.

This treatment of the erroneous expression is different, in the most important respects, from that of the indefinite expression. At the base of it lies the assumption that we have before us a definite thought in union

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These applications show that the rule has another sense than that which permits a preference to the aequitas with which it is ordinarily but erroneously identified.

(a) L. 17. de leg. (1. 3.) "Scire leges non est verba earum tenere, sed vim et potestatem." L. 6. S. 1. de V. S. (50. 16.) L. 13. S. 2. de excus. (27. 1.) L. 19. ad exhib. (10. 4.)

(b) The moderns call it by unroman expressions *interpretatio extensiva, restrictiva* and oppose it to the *declarativa* which neither extends nor narrows, since it has no concern with a law defective in this way.

with an imperfect expression. This relation we cannot detect, as we can indefiniteness in a logical, but only in a historical way, on which account the recognition of it is, of its very nature, more unsafe and likewise admits of different degrees of certainty. This difficulty moreover is further aggravated by the circumstance that the most obvious and most natural means of knowing the thought is denied to us: for this consists in the expression and it is precisely to the expression that we here refuse confidence. Further in respect to indefiniteness the need of an artificial remedy was indispensable since without it there was nothing at all in existence which we could regard and apply as law. In the present case it is otherwise for the expression, even when uncorrected, exhibits an understandable and applicable thought. Lastly in the case of indefiniteness, the recognition of the defect was entirely distinct from the remedy; here the two coincide; for we recognize the incorrectness of the expression merely by comparing it with the real thought; if this however is known to us, with it the remedy for that fault is likewise found.

The three remedies above stated (S. 35.) shall now be put severally to the test, as to their applicability to the defect here stated which consists in the incorrect expression.

Here again the internal connexion of the legislation as a means of remedy, appears the most unquestionable. An example is found in the *Senatus consult* which more accurately defined the *hereditatis petitio*. According to this the honest possessor who had sold things belonging to the inheritance was to restore the price obtained *(pretia quae pervenissent.)* Under this expression, the case of his having again lost the price

was also included, for he would still once have obtained it. However from the subsequent words of the same *Senatus consult*, it was inferred that this case is excepted. The expression used was therefore explained in the restrained way as if it had spoken not of every one who obtained the price but of him who had obtained it and not afterwards lost it.(c) Another example is found in penal laws. When such a law expresses a general punishment for a certain delinquency, while another punishment had previously been determined for a single case of the same delinquency, the general direction is to be narrowed in the explanation by the excepting of this particular case.(d)

More important also however more dangerous, is the application of the second remedy which consists in recognizing the actual thought of that law from its grounds and correcting the expression according to them. In this connection the distinction between the special and general grounds is peculiarly important (S. 34.)

A special ground may be applied to the purpose in question. This is done in the least questionable manner when the literal interpretation of the expression would lead to a conflict with the known grounds. If therefore *e. g.* a provision of law is introduced for the advantage of a particular person, every single application of it to his loss would be in contradiction with the ground, and this must be guarded against by a narrowing interpretation of the too general expression. Hence when a contract occasioned by fraud is by acci-

(c) L. 20. S. 6. L. 23. de her. pet. (5. 3.)
(d) L. 41. de poenis (48. 19.)
(e) L. 25. de leg. (1. 3.) L. 6. C. eod. (1. 14.)

dent profitable to the defrauded, it remains binding although the expression of the edict declares all such contracts invalid.(*f*) When the minor without a curator conducts a case and wins it, the proceeding remains valid.(*g*) In like manner an agreement as to alimony even without the *Praetor* is valid, when the position of the person entitled is absolutely bettered by it.(*h*) More frequent however and likewise more difficult are the cases in which we correct the expression not exactly to obviate a contradiction with the grounds but merely in order to find the true limits of the application consequently that this may not happen either in an incomplete or excessive manner. We must seek the vindication of this mode of correction in explaining in a probable manner the occasion of the inexact expression: perhaps in a concrete expression being employed because a corresponding abstract was wanting or on account of the greater ease of perception which the concrete carries with it. Thus alone can the doubt be safely removed whether in fact the thought which proceeds from our interpretation, is the actual thought of the legislator or whether it is merely what that thought ought in consistency to have been. In the latter case we should no longer be correcting the expression by our interpretation but the thought itself and that the interpreter is not privileged to do this, will be more fully shown below (S. 50.) The following examples will make clear what has here been said. The edict threatened infamy in the case of a widow marrying again during the time of mourning. The object was merely the guarding against all doubt as to the paternity of a subsequently

(*f*) L. 7. S. 7. de pactis (2. 14.) L. 30. C. de transact. (2. 4.)
(*g*) L. 2. C. qui legit pers. (3. 6.) L. 14. C. de proc. (2. 13.)
(*h*) L. 8. S. 6. de transact. (2. 15.)

born child. If the *Praetor* had directly expressed this and likewise desired to state the exact limits, a detailed definition and likewise a decision of difficult questions (as to the possible duration of pregnancy) would have been necessary. This was avoided by the distinct specification of the time of mourning which besides was entirely suitable to the majority of cases and likewise by its wide comprehension set aside those difficult questions. Then however cases occurred in which the widow had given birth to a child soon after the husband's death; by this all doubt as to future children was absolutely removed and in that case, by means of a narrowing interpretation of the edict, the marriage was permitted. Cases occurred in the other direction in which no mourning for the dead, consequently no time of mourning was established; nevertheless was the marriage forbidden, and the edict was here extended by interpretation.(i) The *actio ad exhibendum* every one interested in the exhibition had, and this stood evidently so in the edict. This expression met the case of every one to whom the seeing of the thing would be an advantage; but the recognized aim was directed to freeing claims of right from the hindrance which might arise to them from the accidental and local relations of a thing. Hence that expression was narrowed by interpretation to every interest which stands in connexion with a LEGAL CLAIM.(k) The twelve tables required for the usucapion a possession of two years in the case of a *fundus*; of one year in the case of all other things. To which of them now should houses belong? Literally they were in truth not embraced by the expression *fundus*; since

(i) L. 1. L. 11. S. 1. 2. 3. de his qui not. (3. 2.)

(k) L. 19. ad exhib. (10. 4.)

however usucapion embraced all things generally and because for this purpose all things were to be divided into two large masses, the meaning of the law was without doubt to put together all immoveable things by reason of their complete homogeneousness ; and the concrete expression *fundus* was merely used because a corresponding abstract expression was wanting. Hence that word was applied by extension to all immoveables, therefore also to houses, and this interpretation seems at no time to have been a matter of dispute.(*l*) In many laws, it is true, which deal with concrete cases it is expressly added that they are not to be regarded as a mere expression of abstract rules : by such an injunction this sort of extending interpretation is expressly shut out.(*m*) Lastly the assumption of an indirect expression, which is called the *argumentum a contrario,* belongs to this species of extending interpretation. A rule may namely be in such a way thoroughly expressed, even to the limit which defines it, that in that expression the definite thought is contained—outside these limits, the opposite must prevail. Thus *e. g.* when the *Praetor* introduced an action with the customary expression *intra annum judicium dabo,* there lay likewise in that expression the meaning: *post annum non dabo* and the referring of the expression to this meaning is unquestionably an extending interpretation.(*n*) So the L. Julia de vi said that the *Praetor*

(*l*) Cicero, top. S. 4.

(*m*) L. 10. C. de revoc. don. (8. 56.) and Nov. 115. C. 3. pr. are examples.

(*n*) L. 22. de leg. (1. 3.) "Cum lex in praeteritum quid indulget, in futurum vetat." Donellus (1. 14.) explains this difficult text very probably correctly of cases of the sort here described so that the praeteritum and futurum is not to be referred to the period of the promul-

appointed for this delinquency, could extend his jurisdiction "*si profiscatur*;" in this was contained the converse proposition that he otherwise could not do it.(o) In the same way each exception expressed in a written law points to the existence of a rule without which this exception would have no meaning; it is therefore an indirect expression of this rule. When therefore the L. Julia de adulteriis deprived the woman condemned, of capacity to give judicial evidence, it necessarily followed from this that this capacity appertained to other women.(p)

On the other hand the general ground of a law, *e. g.* the *aequitas* on which it rests, cannot lead to an interpretation by which the expression is to be considered incorrect and undergo a correction; because this process at once entirely bears the character of an independent formation of law different from interpretation, since we do not say what is contained in the thought of the law, but what must have been consistently admitted into it if the legislator had made it clear. This last assertion always has attached to it an uncertainty remaining in the back ground, in that from the remoteness of the law from this its general ground, many contradictory intermediate grounds may be conceived, through which the legislator, even with distinct insight into the whole relation, may nevertheless have been withheld from giving to the written law the modifica-

gation of the law, since this can have no influence upon acts already passed, but of the point of time lying in the future, here therefore to the expiration of a year after the right of action had arisen. Before this expiration the action is to be permitted (in praeteritum indulget), therefore it is to be afterwards forbidden (in futurum vetat.)

(o) L. 1. pr. de off. ejus cui mand. (1. 21.)

(p) L. 18. de testibus.

tion desired by us (S. 34). When we find not seldom in the Roman jurists interpretations of this sort, they cannot serve as patterns for us in this matter for the Romans, as will be shown below, did not sharply separate interpretation and law-making.(q) To this place among others belongs the rule that in each purely prohibitive law the nullity of the transaction must be added to it in thought.(r) If we would regard this as a valid rule for our interpretation, it would be in contradiction of the assertion just made, since great extension would here be attributed to the expression of a bare prohibition, on the grounds of conformity to the purpose and efficacy. That provision is in fact an entirely positive law and conceived in connexion with other texts of our law-books expressing a simple prohibition, is an authentic interpretation of those particular texts; it is therefore not an injunction and pattern for our own interpretation.

If it follows from all this that the special ground of the law is, and the general is not, admissible for the rectifying of the expression, it must likewise be kept in mind that no sharp limit is fixed between the two sorts of grounds (S. 34). Through the numerous gradual transitions of one into the other, the possibility of a real interpretation and the distinguishing of it from the progressive developement of the law, will often become difficult.

On the other hand it is subject to no sort of doubt that the third of the remedies above stated, the internal

(q) I find examples of this kind in the following texts: L. 40. pr. de her. pet. (5. 3.) L. 2. S. 1. 3. ad Sc. Vell. (16. 1.) L. 1. S. 6. de aedil. ed. (21. 1.) L. 15. L. 6. S. 2. de j. patr. (37. 14.) L. 2. pr. S. 1. de cust. (48. 3.) Compare below S. 47. and S. 50. at the end.

(r) L. 5. C. de leg (1. 14.)

value of the result (S. 35). must in no circumstances be employed for the recognition and improvement of the erroneous expression; since it is manifest that in such a process, would be comprised not an assimilation of the expression to the thought but an attempted improvement of the thought itself. This may be beneficial as a developement of the law but is interpretation only in name.

SECTION XXXVIII.

INTERPRETATION OF THE LAWS OF JUSTINIAN (CRITICK.)

The general principles of interpretation explained are now to be specially applied to the Justinianean legislation, the interpretation of which again brings with it new difficulties and makes new rules of proceeding necessary. In this place the historical knowledge of this legislation will be completely presupposed so that the question will be merely of the application of this knowledge to the task of interpretation.(a)

The wholly peculiar position of the interpreter is, in this matter, based upon the great distance between himself and the arising of the law to be interpreted. Hence we are deprived of the entire advantages of visual perception and immediate certainty, which may arise from communion of life with the people in which a law arose and we must seek as far as possible to supply the place of these advantages by intellectual exertion. Hence especially interpretation embraces an

(a) Quite designedly therefore nothing will be said here of the arising of the Justinianean law-sources, of their parts, their language and the aids which we employ upon them, of manuscripts and editions of the text.

aim in addition to the obtaining of a result in definite rules of law. We must so completely make a part of ourselves, the law-sources handed down to us, in all their peculiarity that they may serve us instead of the common life. Difficult as this task is in itself, it is lightened by the great literary excellence which we detect in the most important parts of those law-sources.

The foundation of all interpretation is a text to be interpreted and the establishment of this text is called CRITICK. This therefore precedes interpretation although this preceding must be understood of the proceeding as a whole, not of each individual application; for in single cases the business of Critick can only be accomplished in common with that of interpretation. Critick presents itself in two parts as DIPLOMATIC (relating to diplomaties) or lower and as *higher* critick. The business of the first consists in storing up materials securely and completely, that of the second in determining the true text from the given material.

The business of critick is just as general as that of interpretation and in no way confined to the Roman law. Since however it is of greater importance and difficulty in this than in other systems of legislation, I have preferred treating it for the first time in this place, where it can be explained in complete coherence and without burdensome repetitions.

In relation to critick the simplest case is first to be considered in which the law-giver immediately delivers to us the text of the law in a shape to which he himself attaches public credit. In this case, which since the invention of printing is not merely possible but very common, the diplomatic critick necessarily drops; it

seems moreover that the higher critick also, if it would assert at any time an error of the press, must be banished as a revolt against the will of the law-giver. It has however been above shown that even the actual expression of the law must by interpretation be rectified by its thought (S. 37), a proceeding which rests upon the preference of the spirit to the letter. Now the printed text in relation to the expression actually used is to be regarded merely as the letter of the letter, stands on lower ground than it, and hence cannot withdraw itself from a similar rectification. In truth however this case will very seldom occur and it has consequently very small importance in the general examination of Critick.(b)

However the case here described is also in no way that in which we find ourselves in relation to the sources of the Justinianean law. That we have no text officially handed down every one concedes. If the critical efforts of the glossators had come to a completion, the reception of this vulgata would have taken the place of an official text, though even by it, as has just been shown the occupation of the higher critick would

(b) A remarkable example of modern date is the following. The royal Westphalian decree of 18th Jan. 1813. art. 3. imposed upon the owners of the tithes of estates a tax of 1-10th of the ground-rent "if the owner receives 1-10th of the NET (REINEN) PRODUCE otherwise in proportion to his receipts. (Bülletin n. 3. of 1813. S. 45.) In a later part of the legal bulletin stands "Bülletin n. 3. .... for the NET (REINEN) PRODUCE, read GROSS (ROHEN) PRODUCE. This correction which appeared also at the same time in the *Moniteur* of 3rd Feb. was however without signature or authentication and moreover contradicted the written authentic original. The practical result of the two readings is very different and the question was which should be preferred. By the first the law was logically coherent with the general system of taxation but very difficult to apply: as to the second the case is exactly reversed.

not have been excluded; but a finished vulgata in this sense has never existed and a reception of it was therefore impossible (S. 17). We have consequently nothing before us but a considerable number of manuscripts which are very diverse in age and value. Even the complete agreement of them in a reading, can only by a species of fiction be put on an equality with the official communication. From such an agreement in truth there arises merely a higher degree of probability that we have the original text before us, no certainty. Modern writers have been afraid that all certainty of practice would be at an end if freedom was given to critick, and they have therefore either entirely rejected it or shut it up within arbitrary and narrow limits.(c) This anxiety is to protect a given text against the danger of arbitrary changes. It is however vain since the given text, which they desire to guard, never existed at all. If we look for what they conceive as such, we discover ideas as discrepant as obscure. The vulgata or recension of Bologna might have served for one if it had come to that condition. The agreement of all manuscripts preserved gives again a definite idea, although no right to the refusal of critick; but they do not mean this. They do not so mean, partly because in disputed cases up to the present time critick has scarcely begun to know that agreement by experience, partly because the resistance to critick principally rested upon the fear that the views established in the courts would be destroyed by a more thorough examination, and there

(c) Thibaut entirely rejected the practical use of the critick (Versuche Bd. 1. Num. 16.) afterwards he gave up this opinion (Logische Anslegung S. 44.) Feuerbach will only allow conjectural critick to get rid of absence of meaning or contradiction (civilistische Versuche Th. 1. Num. 3.) In like manner Glück I. S. 35. Num. 5.

was danger of a comparison of manuscripts in that point of view. If one gives up these determinations of the given text, which is not to be touched, there is scarcely anything left to accept for the purpose but that text which most people use because it is that of the most widely spread editions which perhaps the Gothofredian must be considered to be.(d) But so shifting and so arbitrarily conceived a notion ought certainly to make no claim to serious regard.

SECTION XXXIX.

INTERPRETATION OF THE LAWS OF JUSTINIAN (CRITICK.)

(Continuation.)

As the right of Critick has been made good by these reasons, the rules for conducting it must be further established. Diplomatic critick has to collect manuscript materials and by means of examination marshal them externally according to their age and value. It has the further duty of preserving in purity the received canon by a rejection of all foreign parts (S. 17). which according to the arrangement of most modern editions may easily through oversight be included in that canon.(a) The task of the higher

(d) Most opponents of Critick think thus without making it clear to themselves or expressing it. It is definitely expressed amid many confusions in Dabelow Handbuch des Pandectenrechts Th. I. S. 204. (Halle 1816.) He however makes absolutely no use of it but allows great freedom to Critick.

(a) Still worse than the erroneous application of the unglossed but authentic text is the case indeed when here and there the summaries composed since the 14th century and more recently received into the editions, have been regarded as portions of the Roman law; this great misconception is however readily explicable. While the glosses and the observations of the moderns constantly stand in the

critick divides itself into two parts: the employment (working up) of the manuscript material furnished by the diplomatic critick and the improvement of it. It has therefore in pursuance of the first part of this task, first of all, by a free seleetion from the manuscript material, to form a text. It must of course take into account that probability which may be derived from the number and worth of the manuscripts in favour of one or more readings; it however remains free as to the selection and is not fettered by any class of manuscripts (*e. g.* the *Vulgata*): in truth in many important applications this freedom has been in general constantly recognized, even by those who have in their general theory expressed themselves decidedly against the use of critick. There are for example in the digest a considerable number of texts upon which the Florentine text is from omissions unmeaning; but other texts present a complete text of undoubted authenticity: in the same way there are many texts in which the opposite appears.(b) Now I know not even a single author who has gone so far in his critical rigorism as to reject these two-fold emendations: and yet of all the arbitrary limitations above set forth, the opinion, which might perhaps ascribe exclusive predominance to the text of Bologna, has most historical appearance

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margin of the editions, these summaries stand as titles in the middle of the text and may easily be taken for text. Comp. on this matter Savigny Beruf unfrer Zeit S. 62. and Gesch. des R. R. im Mittelalter. B. 6. S. 162.

(b) Savigny Geschichte des R. R. im Mittelalter. B. 3. S. 167. 171. In truth it might be said that the enlargings from the Florentine, here referred to, had already become parts of the Vulgata; but the Bolognese have left to be made by us, not a few similar emendations which were first added from the Florentine at a later time and to which objection has nevertheless never been made.

in its favour. In our current editions we do not observe that two-fold necessity because into them the emendations mentioned have been in general received, and from this operation it becomes quite manifest that at no time was a general opinion in the recognition of a defined text established, as it cannot be denied that it was as to so many and so important propositions of law (S. 20). Punctuation finally belongs also to this first division of the task of the higher critick; by it the logical membering of a text is determined and it therefore, according to its innate nature, might be regarded as interpretation although by its form it coincides with the business of the critic. Curiously enough many have even regarded the changing of the customary punctuation as a species of emendation(c); but the notion of a customary punctuation is, just as much as that of a customary text in general, entirely vain and nugatory. In fact the manuscripts for the most part hand down to us nothing but unbroken rows of letters; how we shall divide these into words and render the words members of a sentence, is entirely left to our discretion. The slender and uncertain beginnings of punctuation in some manuscripts cannot be at all a matter of interest.

The second part of the business of the higher critick still remains to be noticed; it consists in the improving of the text of the manuscripts, therefore in conjectural emendation.(d) This conjectural critick it is in particu-

(c) Feuerbach ut. sup. P. 93.

(d) Emendation is wholly relative and has constant reference to any supposed text whatever, which is at the particular time to be improved. Hence even the mere correction of errors of the press may be deemed such; still one commonly confines the expression to the improvements of a scientific character *i. e.* to such as have for their object-matter, the text of certain manuscripts or that of the editions based upon them.

lar which has mainly produced so great a resistance to the critical handling of the text of our sources. It is also undeniable that since the 16th century, this critick has, especially by the French and the Dutch been practised in an arbitrary and inconsiderate manner. It is certainly not my intention to speak on behalf of this abuse, but the important nay indispensable right to the use of it in a proper manner, we ought neither to surrender nor permit to be narrowed by arbitrary conditions.(e)

The two applications of the higher critick here stated, to the selection of manuscript texts and to their correction, have a resemblance, not to be easily mistaken, to the two sorts of interpretation of defective laws, in the case of the indeterminate and the faulty expression (S. 35—37). If in this case also we ask for the most certain means of recognizing the genuine text which it is our business to establish, we find the first and most important means to be the innate necessity derived from the connected viewing of the text itself. This must not however be undertaken according to general notions but according to the special literary character of the text on which the critick is actually employed or of the class of texts to which this particular one belongs. Hence in this species of critick little is to be done by rules; the matter mainly rests upon a critical sight educated by a continuous study of the sources and upon a circumspect, self-distrustful sense of truth. A similar means consists in the comparison of the doubtful text of the written law with other texts; this

(e) There is such an unpermissible limitation when persons will only permit conjectures as a last resource against meaninglessness of text or internal contradiction in the legislation.

comparison however can only give certainty to the emendation in the proportion in which a close relationship between the two texts prevails. The emendation established in this manner may obtain a more external corroboration, when it is possible for us to explain in a probable manner, how the text which we pronounce to be incorrect has arisen out of the true text by means of the copyists. This can in the first place be effected by analogy. There are for example certain faults which recur very frequently and uniformly and of which the supposition of itself carries with it a certain probability. To this class belongs; the frequent interchanging of certain letters with one another; further, the omission of a letter when the same letter went immediately before, in which case therefore we desire to restore the letter which has fallen out (gemination); lastly the skipping or transposition of whole lines in the manuscript lying before the copyist—a hypothesis indeed which is a subject for much more hesitation. The probable explanation of the origin of an erroneous text may in the second place be that one of several readings is more difficult to be understood than another, so that the copyists have rejected the true text, simply because they did not understand it. It may be lastly that the law had been itself changed at the time at which the copyists lived, so that the law once prevailing was on this account corrected in the copies.(f) On

(f) To this head belongs S. 4. J. de nupt. (1. 10.): "Duorum autem fratrum vel sororum liberi, vel fratris et sororis, jungi *non* possunt." Many manuscripts have, many others have not, the *non*. The rejection of the *non* in itself unquestionable is strengthened by the fact that at the time of the arising of our manuscripts, every copyist certainly knew that the marriage of the children of brothers and sisters was forbidden by the Canon law. In truth such cases as this are rare. On the other hand it seems very obvious and very fruitful to employ in emen-

the other hand every explanation of the fault, which rests on the hypothesis of abbreviations in the original manuscripts which might have been wrongly written out at length by the copyists, is to be rejected; for, since Justinian absolutely forbade the use of abbreviations in the manuscripts of his laws,(g) certainly a few only of these can from oversight have crept in and these cannot suffice as ground of any probability whatever in individual cases.

SECTION XL.

INTERPRETATION OF THE LAWS OF JUSTINIAN (*Continuation*)

(SINGLE TEXTS IN THEMSELVES.)

In actual interpretation, the rules peculiar to the Justinianean legislation have reference only to the largest and most important parts of it, the digest and the code. Each of these law-books forms one large whole composed of a mixture of historically different and distinguishable parts. How these parts are to be treated singly for themselves and how in relation to the whole to which they belong, is now to be stated.

For the interpretation of the single texts independently, all historical characteristics of them are to be made available, consequently everything that we know from the superscription and the subscription, of the date, author, occasion, of the text, as also of the completely different whole to which they have perhaps originally

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dation the history of the pre-justinianean law; in fact however this employment is almost entirely inadmissible as will be shown more at length below.

(g) Const. Omnem S. 8. L. 1. S. 13, c. de vet. j. enucl. (1. 17.) L. 2. S. 22. eod. Const. Cordi. S. 5.

belonged.(a) Then moreover for this interpretation the richest material is furnished to us by the comparison not only with all other texts of the Justinianean legislation but also with the collected earlier and later law-sources; further the scientific use of that rich treasure can in no way be narrowed to us by the above established boundaries of the received canon (S. 17).

Further the great diversity of those parts is in this connexion important; following that diversity we may regard them as of two classes. The first and most numerous class embraces the whole Digest and in the Code the rescripts. These are according to their principal destination testimonies to the law existing in their time; they have so far a scientific character and the systematic element of interpretation is predominant with respect to them (S. 33). However warning must here be given against a two-fold misuse which might result from the recognition of this character. First namely the rescripts have in no way kept strictly to these limits; the developement of the law has been rather effected by them to a not inconsiderable extent (S. 24.); aye even to the scientific works of the old jurists, although to a smaller extent than in the rescripts, this developement is not strange (S. 14—19.); this will appear still more clearly in characterising their method of interpretation. Secondly it would be wholly erroneous for one to hesitate to apply the above explain-

(a) This last is mainly applicable to the Digest in which each text must be regarded as originally part of a juristic work. Here and there however it is so to passages of the code where several of them have formed one constitution (coassation.) This case presents itself oftener in the Theodosian code, still it is not strange to that of Justinian. L. 5. c. de act. emti. (4. 49.) combined with L. 3. c. in quib. causis. (2. 41.) may serve as an example.

ed fundamental principles for the interpretation of written laws, to the rescripts in the code and to the digest as a whole, because these parts of the sources were originally not laws; for those principles are intrinsically as applicable to every other sort of shape of juristic thoughts as to written laws, although the unfolding of those principles was primarily necessary for the sake of laws; and I have accordingly hitherto selected examples illustrative of interpretation without regard to whether the texts to be interpreted, were or were not, originally of the nature of laws. The second class of the parts of the large law-books is that of laws originally, to which only the edicts in the code belong. As to these the historical element of interpretation is as predominant as the systematic was there.(b) The novels, which are mainly not portions of a larger whole but merely laws standing alone, have an entirely similar nature.

SECTION XLI.

INTERPRETATION OF THE LAWS OF JUSTINIAN (*Continuation*)

(SINGLE TEXTS IN RELATION TO THE COMPILATION.)

It is now further to be determined what as to the interpretation of single texts follows from their relation to the compilation to which they belong as to a single whole.

In the first place that mode of aid to the interpretation of defective laws, which consists in an examina-

(b) Thus *e. g.* the main question as to the interpretation of L. un. c. de nudo. j. quir. toll. is: What law prevailed in this matter at the beginning of the reign of Justinian and what therefore was really altered by that law?

tion of their internal coherence (S. 35.), obtains through this relation an entirely new significance and importance; for since now the whole digest is to be treated as a single great law of Justinian and the same is true of the whole code, this means of aid obtains an uncommonly great and well-founded extension.(a)

Further a new means of interpretation arises from the fact of a single text being inserted under a particular title; for since each title of the digest and the code is distinguished from all other titles by the special legal institution to which it refers, a well-grounded conclusion may be drawn, as to the doubtful meaning of a single text embraced in such title, from its peculiar object-matter. It must still however not be overlooked that numerous texts have, from oversight and in consequence of an external show of relationship, been inserted in a wholly unsuitable title and in this case that rule of interpretation must not be employed.(b) However even in ordinary cases one would be giving to that rule an inordinate extension if one desired to narrow each text to the special object-matter of the title in which it is, since that text may actually, by the side of that object-matter, even without any oversight of the compiler, embrace a wholly different, aye often more

(a) The comparison of two texts in the digest may be undertaken with entirely different aims. First to remedy the indeterminate or erroneous expression of the one by the other, with which we are concerned here; secondly to remove a contradiction between the two texts which can be treated at greater length below only.

(b) One calls such *leges fugitivae*. L. 6. *de transact.* (2. 15.) gives an example; by reason of the word *transigi* occurring in it, this law has got into the title de transactionibus although it contains no rule applying to transactions as a comparison of it with L. 1. S. 1. testam. quemadm. aper. (29. 3.) plainly shows.

important one. One might have sought a similar means of interpretation in the order, in which the individual texts of a title stand to one another, if that order had been determined by their contents; but in the code the texts of each title evidently stand in chronological order. In the digest the chronological order by no means prevails, but as a rule too an arrangement merely external, by which that use in interpretation is just as much excluded. The place which a text obtains in the title is only exceptionally determined by the contents and then that place can also be made use of in the interpretation.(c)

Lastly the modifications, to which numerous texts have been subjected in their reception into the compilation, are very specially important and are in fact of three sorts.

The first and most direct kind is composed of those cases in which several texts, on their reception into the compilations, have been partially changed; this procedure is ordinarily called an INTERPOLATION or *Emblema Triboniani*. Many of these interpolations admit of being indicated with great certainty(d); a still greater number can only be asserted with a certain probability or remains entirely concealed from us. The permission for such interpolations, aye a direction to make

(c) Bluhme Ordnung der Fragmente in den Pandectentiteln Zeitschrift. f. geschictl. Rwiss B. 4. S. 290.-366. 414.

(d) Thus *e. g.* usucapion for landed property continued until Justinian for two years, he put it at ten and sometimes twenty years, what according to the usage of the old language, is called *longum tempus*. Hence the expressions in the texts of the old jurists *usucapio* and *usucapere* were changed, although unnecessarily, into *longi temporis capio*, and *longo tempore capere*. Comp. L. 10. S. 1. L. 17. L. 26. L. 33. S. 3. de usurp. (41. 3.) and many like texts.

them, Justinian has expressly given to the author of the compilations and the very natural aim was that older texts, when single expressions in them were no longer suitable to the existing law, were to be made by their alteration fit for reception into the law-books.(e) Hence results the important rule that in the critick of the text, comparison with the *pre-justinianean* law-sources is permissible only in the most limited way, namely perhaps only in cases in which it can be shown, that a variation of the law therefore a permission of the interpolation had certainly not existed.

A second, less evident, sort of changings consists in single expressions of some text, in their connexion with the compilation, having received another meaning, than that in which they had been written down by the original authors. Hence the texts were suitable to the compilation without the necessity of altering anything. An undoubted example is found in the law of servitudes. These were according to the ancient law regularly acquired by *in jure cessio* whence in reference to servitudes the old jurists very often speak of a *cessio*. In Justinian's time the *in jure cessio* had entirely disappeared, but the expression *cessio* might be used throughout, also in the common meaning of transfer generally, without reference to the form employed; and so in many passages they left that expression unchanged, in the perfectly correct expectation, that it would now be understood by every one in this general meaning.(f)

(e) L. 1. S. 7. L. 2. S. 10. C. de vet. j. enucl. (1. 17.) Const. Haec quae necess. S. 2. Const. Summa S. 3. Const. Cordi. S. 3.

(f) Of this sort are L. 63. de usufructu (7. 1), L. 20. S. 1. L. 39. de S. P. U. (8. 2.) L. 3. S. 3. L. 10. L. 11. L. 14. de S. P. R. (8. 3). L. 15.

Still more frequent and important is the case in which not a single expression, but the decision of a question of law has remained unchanged but is conceived in the compilation in a different connexion, and must be referred to another ground than in the old jurists: so that both here and there the decision was equally correct but in a different way.(g) The interpretation which rests upon a presupposed changing of the second sort is conveniently called a *duplex interpretatio.*

Lastly there exists still a third sort of changings, similar to the second, but with the difference that it relates not to single changed legal propositions but to the whole internal structure of the compilations. In

L. 18. comm. praed. (8. 4.) It is possible that in several of these texts, *in jure cessio* originally stood and that the words *in jure* were removed. Then these would belong in part to the first sort of changings, in part still to this sort because still the word *cessio* contained in it would have received another meaning; but the supposition made is not necessary; Gaius and Ulpian are accustomed for the most part to add the words *in jure;* they are however sometimes omitted by them. Gaius I. S 168—172. II. S. 30. 35. Ulpian XI. S. 7.

(g) Thus *e. g.* L. 11. pr. de public. (6. 2.) says "Si de usufructu agatur tradito, Publiciana datur." (Exactly the same afterwards of the Praedial servitudes.) Ulpian undoubtedly thought thus on this matter: when a usufructus is not formally (by the *in jure cessio*) established but still by tradition, the genuine *confessoria* (the *vindicatio usufructus*) is not at all available but merely the Publiciana to the grounding of which tradition is quite adequate. As to the law of Justinian, the text only obtains a meaning by one's adding in thought that the subject of the usufruct is a non-proprietor for this is in fact the single case in which there can still be a question of that action—When my neighbour's house is about to fall and I obtain first a missio and then a second decree, I shall obtain the publiciana and the capacity for the usucapion. L. 5. pr. L. 18. S. 15. de damno infecto. (39. 2.) That originally meant that the Praetor by the second decree would give the property, but not more than the bonitarian: in Justinian's time it must be understood of a case in which the neighbour had no property which he could prove.

this class I reckon the wholly new and very important position which the numerous rescripts have obtained by their reception into the code. The rescripts were to have judicial force for the case by which they were occasioned, not for other like cases (S. 24.) In the compilation they have obtained an operation directly reversed. For the single case, which occasioned them, they have no longer any existence since this had already entirely disappeared in Justinian's time: on the contrary the rules of law, which they embraced, expressed in concrete form, are now elevated to the position of general laws. This new importance of the rescripts we should of necessity have derived from their mere reception into the code, since this could have had no other conceivable object: Justinian moreover has ascribed it to them by express explanations.(*h*) In this matter the task consists in discovering the general rule therein expressed from the decision of the individual case, and it is accomplished by applying the right measure in the separation of the concrete surrounding, for in that too much or too little may easily be done.(*i*) Sometimes complete certainty is not to be attained in determining how much is to be reckoned, among the circumstances of the individual case lying before us, casual and foreign to the rule of law. This proceeding is essentially different from the extending interpretation of a law by a comparison of it with its grounds (S. 37.) By this the too narrow, therefore faulty expression is

(*h*) Const. Haec. quae necess. S. 2. Const. Summa. S. 3.

(*i*) An example of the manner in which the Roman jurists had already handled the rescripts in this respect is found in L. 9. S. 5. de j. et f. ignor. (22. 6.) They were led to the adoption of this proceeding by the fact that the rules contained in the rescripts already prevailed as a great authority although not as laws (S. 24.)

corrected: in that treatment of the rescripts there is nothing to rectify but merely to recognize rightly the rule expressed in the individual application.(k) As to this interpretation of the rescripts the above explained *argumentum a contrario* is more dangerous than in any other case of interpretation, since the entire setting aside of the doubt, whether the part of the rescript in which one believes himself to perceive the concealed opposition, has not merely appertained to the accidental conditions of the individual case, is not to be easily attained.(l)

SECTION XLII.

B.—INTERPRETATION OF THE LAW-SOURCES AS A WHOLE CONTRADICTION.

Hitherto the discussion has been of the interpretation of single laws; but the totality of the law-sources above exhibited (S. 17—21) forms a whole, which is destined for the solution of every problem arising in the province of law. In order that it may be adapted to this end, we must make two requisitions upon it: UNITY and COMPLETENESS. In this matter however, we must not confine ourselves to written law alone but rather have regard to all kinds of law-sources. On the

(k) Warning therefore is here needed against a two-fold error by interchanging of the extending interpretation. (1) Interchange with the here described transformation of the concrete decision into the general rule sometimes openly, sometimes concealedly, contained in that decision. (2) Interchanging with the application of the rule contained in the rescripts to like particular cases. This was (as an investing of them with the force of law) forbidden in the old law; as to the rescripts admitted into the code it is prescribed. Extending interpretation has nothing to do with either of these kinds of proceeding.

(l) Mühlenbruch archiv für civil Praxis II. S. 427.

other hand here also, as in the interpretation of single laws, the principles of the normal procedure are first to be stated and then the remedies for defective conditions.

The normal procedure consists in the formation of a system of law out of the totality of the sources. This is essentially similar to the construction of the single jural relations and institutions of law (S. 4. 5), only this construction must here be conducted more in the gross. In this large connexion the ground of the law, which has been treated above as to single laws, (S. 34) preserves a weightier significance and activity, and the organically forming power of legal science (S. 14) appears here in the greatest extension. The collected circle of sources and in particular that part of it which we call the *corpus juris* of Justinian, may from this stand-point be regarded as a single law, so that the rule of interpretation of a single law from itself, is to a certain degree applicable to the interpretation of the circle. The parallelism of the single texts is therefore in this matter of especial importance; but the possession of this in its completeness is rendered peculiarly difficult by the compass as well as the manifold character of those sources.(a)

The faulty conditions of that whole, which may be likened to the defects of the single laws (S. 35), have reference to the two requisitions made above. If UNITY is wanting we have a CONTRADICTION to remove—if COMPLETENESS, we have a GAP to fill up. Properly speaking both admit of being referred to one common

(a) The gloss presents a very useful and thank-worthy foundation for the collection of parallel texts. For the commencement, the notes of D. Gothofredus are already in use; as an extract from the gloss, they have a sort of value.

fundamental conception; for it is in all cases the restoration of the UNITY which we seek: negatively by the removal of contradictions, positively by the filling up of gaps.

The case of innate contradiction between single portions of the circle of sources, is cognate to that of the indeterminate expression in single laws (S. 35. 36.) Both defects agree in the recognition of them being attained in a purely logical method, in remedies being a simple necessity and in those remedies having to be sought elsewhere than in logic—here by the historical method. The most general direction is to resolve the contradiction, wherever possible, into a pure appearance, that is, to seek the harmonizing of the apparently contradictory. Only where this unification is not attained, the following rules become applicable.

The contradiction may occur either within our general circle of sources (S. 17—20.) or merely with reference to the sources hypothetically entering into it (S. 21.).

The general circle of sources consists in Germany, of the written laws of Justinian, the Canon law, the laws of the Empire and of the customary law scientifically arisen or of the practice of the courts. If in these an insoluble contradiction is found, the rule prevails that the newer part of the sources is preferred to the older. The reason of this rule lies in the fact that a contradiction of the kind here described, appertains to the continuous unfolding of the law, so that the practical negation of the older, was bound up with the establishment of the newer rule of law. If now we seek a rule for the present condition of law, this can only be obtained from that still subsisting, not from that already

annulled.(b) A natural limitation of the rule mentioned, is furnished by this reason for it. When namely by the side of the older rule, an exception to itself existed, the abolition of the rule is not necessarily to refer to the exception; the exception rather continues to exist beside the newer rule, if it has not been specially abolished.(c)

The application of the general rule is made in the following way. The genuine practice of the courts, as the most recent working up of the law-sources existing at an earlier time, takes precedence of all the rest. The laws of the Empire follow next in the order of application. Next the Canon law. Lastly the Roman law. The ranking of the two last portions alone requires a closer discussion.

Whether namely the canon law takes precedence, in matters of private law, of the Roman, is much dis-

(b) One can only reckon this sort of contradiction among the defective conditions in so far as one looks upon the older law itself as a part of the law sources and now of necessity as a part which has perished; the condition of the still prevailing sources themselves is consequently not to be called faulty. Hence in the assertion of such a contradiction no blame of the condition of law is involved; on the contrary the admission that single laws are faulty of necessity includes blame.

(c) L. 80. de R. J. (50. 17.) "In toto jure generi per speciem derogatur, et illud potissimum habetur quod ad speciem directum est." L. 41. de poenis (48. 19.) "... nec ambigitur, in cetero omni jure speciem generi derogare ..." the remainder of this text has already been made use of above S. 37. note (*d*.). Whether the abolition is to extend to the exception also, can only be known from the contents of the newer law. One must not apply the principle here stated as a limitation of the general rule, to all the special determinations of the earlier law but only to such as bear in themselves the character of exceptions; consequently not to such special determinations as were themselves merely consequences of the earlier rule. Comp. particularly Thibaut. civilist. abhandlungen num. 7. where that principle is satisfactorily treated.

puted. This at least is undoubted that here also, above all, an accordance must be sought for. The following assertion is made as to the case in which such bringing into accord is not attainable since perhaps an intended modification clearly exists. The two systems, say some, are not valid of their own proper force but through the medium of the reception; so far as we are concerned, that of both took place at the same time therefore they are to us contemporaneous, neither of them has a regular preference over the other and in each particular contradiction, the preference can only be determined by a special practice of the courts.(*d*) However the Canon law has with respect to the object-matters of private law entirely the relation of novels and especially the decretals in which the conflict has its special seat. In this relation the two systems were actually received in Bologna, and when the decretals, first singly then in our collections, appeared, the reception had already taken place, and those decretals in fact stepped in as new modifying laws. In Germany in fact the reception, and from the very beginning, of the entire and complete canon law took place at the same time as that of the Roman; but this happened in the same sense as it took place in Bologna just as they had also received from there the limits of the canon of the Roman sources (S. 17.) This complete connexion of events might have been greatly doubted in case of the canon law having merely found an entrance as law into Italy but of having been not at all received in Germany; but at the

(*d*) (Hübner) Berichtigungen und Zusätze zu Höpfner S. 14—22. Mühlenbruch 1. S. 70. More correct views are found in Böhmer jus eccl. prot. Lib. 1. Tit. 2. S. 70—73, who discusses the question very diffusely without coming to a clearly defined result. Comp. also Hofacker 1. S. 53.

time of the reception the respect for the Pope and the law proceeding from him, was fully as great in Germany as in Italy, so that that fundamental relation of the two systems was recognized in Germany not merely upon the authority of Bologna but on the same ground as in Bologna. It follows from this examination that as to matters of private law, the canon law has, as a rule, preference over the Roman law. An exception to this rule can be only based either upon special practice of the tribunals or, in protestant countries upon the principles of the protestant church-law contradicting a position of the canon law as to private law. The same effect, as by such an exception, may also be produced by the above asserted normal preference of the laws of the Empire to the canon law: if for example the laws of the Empire disallow a particular position of the canon law and have thereby effected the re-entrance of the opposing Roman rule.(e)

SECTION XLIII.

INTERPRETATION OF THE LAW-SOURCES AS A WHOLE (CONTRADICTION.)—(*Continuation.*)

More important and more difficult to handle is the contradiction between single parts of the Justinianean legislation. This occurs to a very great extent and the opinions of the modern jurists are extraordinarily different upon the matter.(a)

(e) Thus for example in the theory of interest in which at least the general principle is recognized that the decisive inhibition of interest by the canon law, is set aside by the laws of the Empire and consequently the permissibility of interest, as in the Roman law, is established. The more minute determinations on the matter are in truth much disputed.

(a) Very good observations on this are found in Thibaut. civilist. abhandlungen num. 6. and in Löhr Justinian's compilation: Grolman

Above all is it necessary to distinguish between the novels and the three law-books. The novels were destined as single laws by little and little to modify and develope the law; they were never united by the law-giver in one collection. Hence in case of contradiction, each novel must be absolutely preferred not only to the three law-books but to every other older novel.(b) Here too the hypothesis of a contradiction is less matter of hesitation, therefore the seeking for accordance less strictly necessary, since it was the direct destination of the novels, to change the law. In truth all the novels were received by us simultaneously with the law-books and one might believe that for that reason, the natural preference, which accrued to them as later laws, would be again annihilated.(c) However that reception took place then in the sense of Justinian, as one of the legacies of laws left behind by him, consequently completely in the way, in which their validity had been established by him at the end of his long reign. Now at that time the novels had already annihilated the earlier law opposed to them and it is therefore quite indifferent that we received the novels simultaneously with the earlier law.

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and Löhr Magazin B. 3. num. 7. A very rich collection of writers in Haubold Inst. Jur. Rom. hist. dogm. ed. 1826. S. 300.

(b) For this purpose the chronological catalogue in Vieners Geschichte der novellen anhang num. IV. is practically important, nay indispensable. Let it not be objected that the glossators have not possessed such a table. The principle of it they also have recognized and applied according to their insight, moreover they have not established another erroneous chronological order. They have therefore on this side as little blocked up the way as that of the critick of the text (17—38.)

(c) (Hübner) Berichtigungen und Zusätze zu Höpfner S. 8—14. makes too much of this objection—in the end, he has recourse to the explanation here given but merely as a friend in need which is entirely erroneous.

We have next for the three law books to establish a more general point of view from out of which the special rules for the case of contradictions may be discovered. Justinian would unquestionably have them regarded as one coherent whole and indeed as a law-book proper, that is to say, as a work from which exclusively the decision of each case was to be taken and which moreover was fully sufficient for this end.(d) This end was to be attained by a selection from the legal material which existed in a huge mass, in such a way that the selected passages should be added to a new whole, with their historical form undisturbed. In this new edifice of law, the Digest was the main building, the single part understandable of itself and not inadequate, to which the two other parts were merely added as an epitome or as an extension. In this position of theirs, there exists no ground however for directly preferring the contents of either of them to those of the other parts. Of the Institutes many have asserted that they must, as a work specially proceeding from Justinian, have precedence of the rest: others that they must as a mere epitome of the Digest stand after; both wrongly. Their destination for a book of instruction is not here in question. As a constituent part of the legislation, they form a single constitution of Justi-

(d) Constit. Omnem. S. 7. Const. Summa. S. 3. L. 2. S. 12. 23. c. de vet. j. enucl. (1. 17.) Hufeland Geist des R. R. 1. S. 143. 145. denies this character of a book of laws because the law-books so often embraced purely scientific matter; but that regards purely their mode of origin and form: as to their destination to serve as statute books, the texts quoted leave no doubt and with that we are alone concerned. It may nevertheless well be that many single texts were not laws but were merely intended for historical material and use will shortly be made of this opinion.

nian(e) and in this connexion, neither to be preferred nor postponed to the larger law-books. Some special considerations as to the case of a conflict are still to be brought to bear. Lastly for the Code, a general preference, on grounds similar to those on which it has been asserted for the Novels, has been not without a show of reason asserted by many, because our present code became law a year later than the Institutes and Digest. On this ground in a conflict of single texts, the Code should constantly be preferred. From this assumption the following strange result would flow. The older code, as to its main parts entirely accordant with our newer one, appeared in 529. As afterwards in 533 the Institutes and Digest were published, they in all contradictory texts derogated from the Code. Lastly in 534 appeared the new Code, which in its turn must derogate from the Institutes and Digest and hence immediately re-established the texts of the first Code, which had been abrogated a year before. It is impossible that Justinian could have intended so fickly to produce an alteration of the law.(f) In fact he could have had no thought whatever of such a derogation, since he supposed no contradictions but entire harmony between the law-books. The single texts of the new Code which, without being forced to the supposition of an absurd alternation and without contradicting the harmony supposed by Justinian, we might treat as derogating ones, are the few which appeared between the Digest receiving the force of law (30 Dec. 533) and the promulgation of the code (17 Dec. 534) therefore

(e) Proem. Inst. S. 6. L. 2. S. 11. C. de vet. j. enucl. (1. 17.)

(f) This ground is correctly brought to bear by Thibaut. ut. sup. S. 83.

in the space of less than a year.(g) That these must be preferred to the law of the Digest is unquestionable, but this preference flows from another more decisive reason of which a more extended use will immediately be made, and it is not necessary for this purpose to bring to bear the later promulgation of the new Code in which those texts are contained. If we sum up once more the general principle for dealing with the three law-books, it is this: they are destined to prevail as a large connected work; their promulgation not being completely simultaneous is without influence and we may without danger of error treat them as if they had been simultaneously promulgated. From this general principle special rules are now to be derived for the treatment of single contradictions, which may present themselves to us within the three law-books.

SECTION XLIV.

INTERPRETATION OF THE LAW-SOURCES AS A WHOLE (CONTRADICTION.)—(*Continuation.*)

In this case the general rule of resolving wherever possible, by reconciliation, the contradiction into a mere appearance (S. 42.) first of all gains a wholly special power and significance; in the first place because the three law-books exhibit a single work, in which there-

(g) Reland (fasti P. 710) enumerates eleven such constitutions. Of them however several, from their contents being ecclesiastical or political, cannot at all be in contradiction with the Digest. There remain the six following which concern private law and are meant to introduce new law: L. 2. c. de jur. propt. cal. (2. 59.) L. 29. c. de nupt. (5. 4.) L. 31. c. de test. (6. 23.) L. un. c. de cad. toll. (6. 51.) L. 15. c. de leg. her. (6. 58.) L. un. c. de lat. lib. toll. (7. 6.)

(h) Löhr as above S. 201.

fore the unity of the thought is to be regarded as in itself the natural condition; secondly however because Justinian expressly affirms that no contradictions exist, and that where we believe that we perceive such, should we scrutinize them with sufficient closeness *(subtili animo)*, we should find an occult ground for the harmonizing of them.(a) This direction is peculiarly important, because by it a somewhat artificial procedure is fully justified—but certainly not one completely arbitrary by the importation of distinctions completely external, for which no inducement whatever is presented, in the contradictory texts or in other parts of the legislation.(b)

Such a reconciliation is however possible in two different ways: in the SYSTEMATICAL and in the HISTORICAL. Both ways are in themselves allowable, although the second is only to be resorted to, where the first does not attain the end.

The reconciliation may be effected in the systematic way by reason of each of the contradictory texts possessing special conditions for their application, consequently province for their mastery, either by our dividing the province of a rule into two halves, according to the different conditions or by our regarding the one text as a rule with which the other is to be connected as a mere exception. It can however also be effected, by the two texts being regarded as a whole, so that the one text is completed by the other, therefore so that the apparent generality of the one is more

(a) L. 2. S. 15. L. 3. S. 15. C. de vet. j. enucl. (1. 17.)

(b) L. 2. S. 15. cit. "..... sed est aliquid novum inventum vel occulte positum, quod dissonantiae querelam dissolvit, et aliam naturam inducit discordiae fines effugientem."

closely determined and limited by the other.(c) The following applications will make this mode of proceeding clear. Many texts allege the possibility of the usucapion; when a title does not in fact exist but is supposed by the possessor to exist;(d) other texts allege the impossibility of usucapion in this case.(e) They are accommodated thus—usucapion is possible where a probable ground for that error can be pointed out, otherwise not.(f) In like manner several texts say that a sale is as between husband and wife simply void, if the price is intentionally higher or lower than the real value amounts to;(g) other texts limit this total invalidity to the case in which such a sale is simply concluded for the effecting of a donation: if on the contrary the sale would also have been concluded, independently of this secondary end, then the sale is valid, and merely the donation, lying in the settlement of the price, invalid.(h) At the basis of this procedure therefore lies the correct view, that a rule does not exclude limitation by means of closer definitions or exceptions, by its being expressed in a purely absolute way but merely by the express

(c) Thus L. 1. S. 9. C. de vet. j. enu. (1. 17.) says that as a rule no texts are admitted into the Digest for those positions which already stood in the Code "nisi forte vel propter *divisionem* vel propter *repletionem* vel propter *pleniorem indaginem* hoc contigerit. That can also be applied to the systematic resolution of contradictions.—Justinian himself gives an example of systematic harmonization of two texts of the Code in Nov. 158.

(d) L. 3. L. 4. S. 2. pro. suo. (41. 10.)

(e) L. 27. de usurp. (41. 3.) S. 11. J. de usuc. (2. 6.)

(f) L. 11. pro. emt. (41. 4.) L. 4. pro. leg. (41. 8.), L. 5. S. 1. pro. suo. (41. 10.)

(g) L. 38. de contr. emt. (18. 1.). L. 17. pr. ad Sc. Vell. (16. 1.)

(h) L. 5. S. 5. L. 32. S. 26. de don. int. vir. (24. 1.) Compare below S. 154 (notes (b) and (c)).

inhibition of such a limitation. In the reconciled texts here quoted, the old jurists have enjoined such a proceeding. On this matter special reference is to be had to the peculiar nature of the rules and formulas framed by the old jurists in the scientific way (S. 14.). Where therefore two contradictory texts exhibit the opposition of such a formula to a concrete determination, we ought almost always to give the preference to the latter. Africanus proceeds entirely in this sense (note *(f)*); a still more important and conspicuous application of this principle has been made in another place (App. VIII. Num. VIII.)

The historical harmonization is effected by means of the supposition that one of the contradictory texts contains the real and abiding expression of the legislation, the other merely historical material. This procedure has been brought into ill-repute through its having been conceived and practised by many in a clumsy manner. They regarded the bare position in point of time as decisive and in all cases allowed to the more modern text, whether of Emperor or jurist, a preference over the older. This unquestionably simple and convenient procedure does not admit of justification according to the general design of the law-books: moreover Justinian himself quite distinctly contradicts it, since as to the Digest he says in so many words that each text admitted, is to be regarded as an imperial law which has proceeded from himself.*(i)* On the other hand

(*i*) L. 1. S. 5. 6. L. 2. S. 10. 20. C. de vet. j. en. (1. 17.) L. 1. S. 6 cit. says: "Omnia enim merito nostra facimus;" the other passages are similar. Of course these expressions were meant primarily to be in direct opposition to the law of Valentinian III hitherto prevailing, so that one should not esteem texts of Julian in the Digest less than those of Ulpian: but the rule is so general that it just as much excludes a

historical accommodation admits of complete justification, whenever an historical object for the admission of the older text can be rendered probable: it will then be postponed to the newer, not because it is older but because it was not intended to be immediately applied.(k) Such an historical end moreover may appear for a two-fold reason. First on account of the jural relations already subsisting at the time of the compilation, since these must still be decided according to the older laws.(l) The second and more important one which admits of a far more extended application—because the new, only valid, texts were to become more clear through the texts extracted from the older law. In this it is assumed that the older texts were admitted for the imparting of a portion of the history of the law, which appeared necessary for the elucidation of the more modern texts.

The correctness of this latter assumption is completely established by the following circumstances. First, by the compilation of the law-books out of historical material which had for centuries been gradually arising, whereby the unfolding of legal principles of necessity became completely visible, while it might have been completely blotted out by the newly written work. Secondly, by the careful preservation of the historical

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preference of new texts over old, based merely upon the difference of their age.

(k) This point is satisfactorily explained by Löhr ut. sup. S. 180. 189—97.

(l) It was not absolutely necessary for this purpose to receive into the law-books, older passages which were no longer to be applied to future cases, because the old constitutions and books had not been destroyed. That however this was in fact done, Justinian himself expressly says. Nov. 89. C. 7.

indications of each text, in cases in which no other end can be conceived than rendering possible the explanation of the prevailing by the earlier law. Thirdly, by the existence of so many new modifying constitutions which are scarcely understandable at all unless they are compared with the earlier law which they were meant to change. Lastly, by the special quality of the Institutes. These were to contain nothing antiquated(m) and nevertheless to exhibit the historical developement,(n) which with respect to many doctrines they do with great fulness.(o) Hence all becomes clear: the institutions, such as mancipation and the rigid marriage, which had disappeared need not be mentioned; however the historical developement of institutions still existing were not to be omitted because without this their modern form could not be understood. How can we doubt about applying to the Digest and the Code as well as to the relation of the three law-books to one another, what as to the Institutes lies so clearly before our eyes, besides being of itself so natural? From this stand-point also all the objections, not without plausibility, which have been attempted against our hypothesis, vanish at once. Justinian, say some, has explained that each text is to be regarded as if it proceeded from himself (note (i)); nevertheless it may well be that any particular one is not destined for absolute application but for historical explanation. They say further: nothing antiquated was to be

(m) Proem. Inst. S. 3. "ut .. *nihil inutile*, nihil perperam positum, *sed quod in ipsis rerum obtinet argumentis*, accipiant."

(n) Proem. Inst. S. 5. In quibus breviter expositum est *et quod antea obtinebat*, et quod postea desuetudine inumbratum ab Imperiali remedio illuminatum est."

(o) Thus *e. g.* S. 4—7. J. de fid. hered. (2. 23.)

received;(p) how that is to be understood has been already explained in speaking of the Institutes. Lastly: no contradictions are to be found in the law-books;(q) but it is not in truth a contradiction when two texts of discrepant contents are received in order that one may receive historical light from the other. Unobjectionable now as historical assimilation for these reasons is, it ought however only to be applied where the systematic is not applicable.(r) This precedence of systematic harmonizing is a natural consequence of the law-books having been published for a practical end, whence it must be assumed, as to each of their constituent parts, that it is intended for practical application, if this supposition is not rebutted by special grounds, which takes place here on account of the otherwise unavoidable contradiction.

However the most important and at the same time the most difficult matter is the establishment of the conditions of the historical harmonization. The rarest case is that, of which an example has been above exhibited from the Institutes, in which a piece of legal history is in its connexion directly delivered to us (note (o)). In almost all cases that sort of harmonization must be first introduced by means of an artificial process. By what means now can we ascertain with certainty that a case for it, is actually present to us?

(p) Const. Haec quae necess. S. 2. L. 1. S. 10. C. de vet. j. enucl. (1. 17.)

(q) Const. Haec quae necess. S. 2. Const. Summa. S. 1. L. 1. S. 4. 8. C. de vet. j. enucl. (1. 17.) L. 2. pr. S. 15. eod. Nov. 158.

(r) This is confirmed by Justinian himself expressly referring to systematic harmonizing only, plainly because he regards it as the normal and natural mode and that which is to be attempted before all others. L. 2. S. 15. C. de vet. j. enucl. (1. 17.). Nov. 158.

The following rule may serve for this purpose. If we find two contradictory texts of different age it may happen that the diversity of contents has been quite demonstrably produced by this difference of age, in consequence of an actual alteration of the law in the interval between the two texts,(s) or, and this is still more common, the alteration has been introduced by the later text itself when this in itself bears the character of a modifying law. In such cases ground is in fact laid for historical harmonization, since we may definitely assert that the authors of the two texts, if they had been written at the same time, would have been in accord with one another. Now therefore we ought to regard the older text as mere historical material for the explanation of the new.(t) Hence then it

(s) This is conceivable through a new law happening in the interval; but also, and still oftener, through the progressive scientific developement of a rule of law. Thus *e. g.* in the theory of loan the rigid rule at first prevailed that a right of action against the receiver could only be acquired by an absolute giving away of money. When however the theory of obtaining possession received a freer developement, this also re-acted upon the permissible form of loan. At the time of Africanus, as it seems, this developement had not yet been accomplished (L. 34. pr. mand. 17. 1.), at the time of Ulpian it had been (L. 15. de R. C. 12. 1.). Here therefore the text of Africanus is purely historical material whereby the gradual developement of this proposition of law becomes knowable. A cognate case to this appears in the appendix X. Another case (L. 23. de don. int. vir. 24. 1.) in S. 161.

(t) A very conspicuous case is found in the Int. de vi. As to this in the Digest the principle of the older law, which limits the interdict to immoveables, is expressly set forth (L. 1. S. 3—8 de vi.) The Code and the Institutes treat it as applicable to things of all kinds. I assume in fact as correct the opinion set forth in my book upon possession S. 40. for of course this question is much disputed. Another case is found in the theory of the *castrense peculium*. If a *filius familias*, who possessed such a peculium, died without disposing of it by will, it fell to the father not as heritage, but *jure pristino*. This

may be entirely a matter of indifference, whether the compilers had designedly so arranged this, a matter which can never be positively proved, or whether the older text has merely been introduced from oversight; for even in this latter case, such an historical harmonizing takes place entirely in the sense of the compilation, and our process is fully justified by its nature and destination.(u) In contradistinction however to the case here described, the historical harmonization should be entirely rejected in the following cases. First when the two texts, so far as we know, are contemporaneous, which must almost always be assumed if two texts of the Pandects proceed from the same jurist or from two living at the same time, since we know little of the chronology of particular works. Secondly when those texts are indeed of a different time but so that this relation as to time is not the reason of the discrepant contents, since they might have run just as differently if they had been composed at the same time. This is *e. g.* to be assumed of such disputed questions as for centuries existed among the Roman jurists; if such a one has got astray in the Digest, it is altogether indifferent that the one text proceeds from Julian, the other from Modestinus since they would have differed from one another in the same way if contemporaries. In such cases, the older text is no evidence of the older

legal position is expressly set forth in the Digest and occurs also in the Code (L. 1. 2. 9. 19. S. 3. de castr. pec. 49. 17., L. 5. ç. eod. 12. 37.) Since however the developement of the so called *adventitium*, this principle no longer suited and so the Institutes say, only incidentally it is true, that that right of the father is only available when the son leaves behind neither children nor brothers and sisters. pr. J. quib. non est permissum. 2. 12.

(u) Löhr ut sup. S. 212.

law, therefore also their reception could have no historical aim and hence historical harmonizing must be pretermitted, since this can be based mainly not upon the difference of age in itself but upon the historical end, to be derived from the demonstrable developement of the law. In like manner however historical harmonization must also be pretermitted as to those texts dissimilar in age, in which it is merely undecided, which of the two relations may lie at the base: since that sort of harmonizing can only be justified by an evident historical aim.

SECTION XLV.

INTERPRETATION OF THE LAW-SOURCES AS A WHOLE (CONTRADICTION.)—(*Continuation.*)

If we apply these rules to the individual law-books, as to the Code, a very extensive permissibility of historical harmonization is the result. If for example the newer text is an edict, it will be most undoubted that it was expressly designed to introduce new law, especially when such a text proceeds from Justinian and most especially when it is of the small number of those which first appeared after the Digest obtained the force of law.(a) The same relation must be assumed with respect to the majority of the later rescripts *e. g.* of the very numerous edicts of Diocletian since at least very often they give evidence of an actual developement of law; but a general preference of the Code to the Digest ought nevertheless on that account not to be asserted, since

(a) Comp. S. 43. note *(g)*. Here therefore the precedence of these texts is rendered practically available but on other grounds than the later promulgation of the new code, which has above been shown to be a not decisive ground.

many older rescripts of the code, will stand in such a relation to the texts of the Pandects, as will not admit of historical harmonizing according to the rules laid down.(b) As to texts of the Digest unlike as to time, the historical harmonization can be more rarely justified: that it may present itself, has already been shown by an example.(c) When lastly the Institutes stand in contradiction with the larger law-books, the following cases may for the most part be laid down with sufficient certainty. Sometimes an oversight in the composition of the Institutes has manifestly occurred, through a text of another jurist having been unskilfully inserted in the Institutes of Gaius: in such a case the Institutes are undoubtedly to be postponed.(d) Many

(b) Thibaut. S. 93. and Löhr S. 213. assert an absolute preference of the Code to the Digest; with this I cannot agree.

(c) S. 44. note (s).

(d) An entirely undoubted case of this sort has been pointed out in the first appendix of this volume: but this has for its object-matter no proposition of practical law. In like manner S. 16. J. de L. Aquilia (4. 3.) is compounded of Gaius III. 219. and the text of Ulpianus ad. ed., which we possess as L. 7. S. 7. de dolo. (4. 3.) By the context the appearance is created, that in such cases as this latter the a. utilis. L. Aquiliae is not available, although in L. 27. S. 19. 20. 21. ad L. Aquil. (9. 2.) it is already permitted. In S. 3. J. de emt. (3. 24.) it is said, for the custody of a slave, the vendor is bound only through express promise, otherwise not. That is consistent with slaves in other legal transactions not needing to be guarded L. 5. S. 6. 13. commod. (13. 6.) Now however to the section of the Institutes quoted, after the mention of slaves, is added: "Idem et in ceteris animalibus ceterisque rebus intelligimus." By this addition the compilers meant to say, in the rule first propounded (which without doubt had been literally extracted from an old jurist) a slave was only named accidentally, whence therefore the principle would still become practical: they in this overlooked however that it was not accidental but that in fact the opposite rule prevailed as to other moveables and in truth on good grounds. L. 35. S. 4. de contr. emt. (18. 1.) L. 3. L. 4. S. 1. 2. de peric. (18. 6.) The

another passage of the Institutes, on the contrary, directly embraces a considered explanation of the legislator's own: such a one is to be regarded as an edict of Justinian and to be preferred to every other text contradicting it.(e) For the most part however neither the one nor the other of these cases will be able to be admitted; the two texts, that of the Institutes and that of the Digest, will rather be regarded as completing one another: this however is a case belonging to systematic reconciliation (S. 44.), whence every other process becomes superfluous.(f)

What in the last place is to be done in the cases in which both sorts of reconciliation are inapplicable, although a contradiction must at any rate be removed? Nothing remains but to prefer *that one* of the two contradictory texts which answers best to the rest of the undoubted principles of the legislation of Justinian. This rule rests upon the presumption of the organic

S. 39. J. de action. (4. 6.) permits the compensation only for that "quod invicem actorem *ex eadem causa* praestare oportet." This limitation is not conformable to the rest of the collected law of Justinian and notably not to S. 30. J. eod. It was already abolished in the time of Paulus, II. 5. S. 3. More, it could not last after Marcus Aurelius had applied the compensation to the always unilateral action on the stipulation. S. 30. J. cit. We now know that these unsuitable words were inconsiderately copied from Gaius IV. S. 61., in whose time therefore the limitation was still in force.

(e) Thibaut. ut sup. S. 96.

(f) Under this head I reckon the following cases—S. 25. J. de rer. div. (2. 1.) and L. 7. S. 7. de a. rer. dom. (41. 1.) mutually complete one another. The text of the Institutes is more complete on account of the rule as to mixed property; that of the Pandects on the contrary on account of the closer weighing and determination of the case of threshed grain. Both texts must therefore be blended in thought. In the same way L. 2. S. 6. mand. (17. 1.) is merely completed by the close of S. 6. J. de mand. (3. 27.)

unity of the Roman legislation, which again finds its deeper grounding in the common nature of positive law in general (S. 5.). A confirmation of its correctness is found in the completely analogous procedure which is applicable to ambiguous expressions of single laws, and as to the correctness of it besides no one doubts. As in the one case a doubt arises from two meanings of the same expression, so in the other it arises from two contradictory passages of the same legislation. As there the verbal doubt is most safely removed by comparison with other parts of the same law or with other laws, so here the material doubt, by comparison with other undoubted principles of the same legislation. The analogy is complete and undeniable. A simple application of this rule presents itself, when we prove a conflict between an entirely isolated expression on the one hand and several harmonious expressions, perhaps emanating from different periods, on the other. We have then reason for presuming the expression of the real sense of the legislation to exist in this consonance rather than in that isolated expression.(g) In the same way when one of the two contradictory texts stands in the place to which the rule in question immediately belongs, the other in a place at a distance. Then of the first it may be assumed that the compilers in its reception had an express consciousness of its meaning and influence, while the second on the contrary,

(g) The case of L. 5. S. 3. de praescr. verb. (19. 5.), which is in conflict with so many texts of different times, belongs to this head. Further the case of L. 23. de don. int. vir. (24. 1.), which is diametrically opposed to many quite clear, undoubted passages (S. 164.) This case belongs also to the province of S. 44; since from the contradictory texts, we convince ourselves, that that text has a purely historical meaning, which from a mere independent consideration of the text itself would be in no way perceptible.

on which the contradiction is based, may have been more easily overlooked. Hence therefore the former expresses the sense of the legislation as a whole more authentically than the latter.(*h*)

In truth Justinian's definite assurance that contradictions did not exist, there is no way of denying (S. 44. (*a*)); but of what avail is this assurance against the evident reality and against the indispensable necessity of a removal of the contradiction where it meets us? One might indeed be led to doubt whether this assurance is to be taken as so thoroughly in earnest. It was part of the plan to obviate contradictions: but so it was to avoid repetitions and the leaving out of important texts of the old law *(similia* and *praetermissa.)* Now it is expressly explained, that oversights of these two latter sorts may have happened and for these the weakness of human nature was very rightly offered as an excuse.(*i*) However this apology and the acknowledgment, with which it is connected, suit equally well the case of contradictions and it seems wholly accidental that as to them it is not expressed in a similar manner.

Hitherto we have spoken of a contradiction within our circle of the sources generally (S. 42. fg.); it remains to consider the contradiction in application to the sources which by hypothesis may be added to them (S. 21).

In general the same rules prevail for this second case as for the former. In particular the newer law must take precedence of the older, whence the normal

(*h*) On this ground the S. 3. J. de usufr. (2. 4.) must be preferred to the L. 66. de j. dot. (23. 3.)

(*i*) L. 2. S. 14. 16. c. de vet. j. enucl. (1. 17.)

preference of the Landesrecht to the common law is determined. In like manner here also this rule is narrowed by reference to exceptions to the older rule, which are not necessarily touched by the newer modifying rule. A second special exception in addition presents itself here. When namely the newer law prevails in a wider province than the older, then as a rule the older is only abrogated when the newer is of an absolute nature, otherwise the older lasts on.(k) On this matter we find this proverb. Will breaks State-law, State-law breaks Landrecht, Landrecht breaks common law.(l)

SECTION XLVI.

INTERPRETATION OF THE LAW-SOURCES AS A WHOLE (GAPS. ANALOGY.)

If we find our law-sources not sufficient for the decision of a question of law, we have to fill up this gap, for the requirement of completeness has just as absolute a claim of right as that of unity has (S. 42). The only question is where we are to seek this completion. Upon this question, various as the expressions of our jurists appear, they are nevertheless essentially referable to two opinions. According to the first a

(k) L. 3. S. 5. de sepulchro viol. (47. 12.) In a town, burying within the walls was allowed by the *lex municipalis*. Hadrian at a later period forbade it generally, there was a doubt which prevailed: however in this case the general but absolute, later precept was to have the preference. C. 1. de const. in VI. (1. 2.) ".. Romanus pontifex ... quia ... locorum specialium ... consuetudines et statuta ... potest probabiliter ignorare: ipsis ... per constitutionem a se noviter editam, nisi expresse caveatur in ipsa, non intelligitur in aliquo derogare."

(l) Eichhorn deutsches Privatrecht.

common normal law (the law of nature) is supposed, which is to stand as a subsidiary by the side of every system of positive law, precisely as in Germany the Roman law stands beside the individual *written* laws (Landes-rechten.) This particular application of an opinion already in general rejected above (S. 15.) needs no fresh controverting here. According to the second opinion, our positive law is completed out of itself inasmuch as we grant the existence in it of an organically forming power. In accordance with our general view of positive law (S. 5.), we must recognize this opinion as the correct and necessary one, and it is essentially the same that has already been applied to the production of unity by the removal of contradictions (S. 45). We call the relation of the propositions of law discovered by this process to the positive law in question, ANALOGY,(a) and it is by it consequently that each perceived gap is to be filled up.

This discovery of law by analogy appears in two degrees. First when a new, hitherto unknown, jural relation shows itself, for which consequently an institution of law as archetype is not contained in the positive law hitherto formed. In this case such an archetypal institution will be newly shaped according to the law of innate relationship with those already known. Secondly and much oftener when in an institution of law already known, a particular question of law newly arises. This will have to be answered according to the innate relationship of the principles of law belonging to this institution, and for this purpose, a correct insight

(a) The Romans took the expression in the same sense: Varro de lingua lat. lib. 10. (in older editions 9.) C. 3—6. Quinctilian. I. C. 6. Gellius II. C. 25. Isidor. 1. C. 27. Upon the proper nature of analogy Stahl. Philosophie des Rechts II. 1. S. 166. expresses himself very well.

into the grounds of the particular law will be very important (S. 34). The discovery of law by analogy may appear in two degrees, as impelling to the developement of law *e. g.* by legislation, in which case it may be exercised with greater freedom. It may however also appear, as we are here regarding it, a kind of pure interpretation, because perhaps the new jural relation or the new question of law is presented first for decision to a judge. Some more precise directions for this kind of application must now be given.

Each application of analogy rests upon the presupposition of an innate consistency in the law: only this is not always a mere logical consistency, such as the simple relation between reason and inference, but likewise an organic one, derived from a connected view of the actual nature of the jural relations and of their archetypes (S. 4. 5). Hence we must constantly proceed from a given matter which we amplify for the solution of the question lying before us. This *datum* may be a determinate single written law, in which case the name of a decision *ex argumento legis* is employed; still oftener however the *datum* may be contained in such parts of the theory of law, as had themselves arisen in the artificial way of abstraction. In all cases however this process is essentially different from the above explained extending interpretation (S. 37), with which it is very often confounded; for this is not merely to fill up a gap in the law, but to rectify the incorrectly chosen expression of a law from its actual thought. In the procedure by analogy we assume that there is a failure of actual idea of any guiding law whatever, and we seek to help ourselves against this fault by the organic unity of the law.

Interpretation by analogy is however wholly inapplicable, when the *datum* from which we proceed is of the nature of the exception to a rule.. In such a case the application of analogy must be at once rejected for the reason that the fundamental condition of it, the want of a rule, will not be present. When therefore *e. g.* a previous law is PARTIALLY abolished by a new law, the unabolished parts continue to subsist.(*b*) If we would extend the abolition to them also, that would not be analogy, for there is no failure of a rule, but rather an extending interpretation and to be sure an arbitrary and groundless one. The matter will stand exactly in the same way with the analogical extension of peculiar privileges (S. 16), with respect to which there can at no time be a want of a rule of law proper to them. And the same case would present itself where an anomalous law or *jus singulare* (S. 16.) should be extended beyond its absolute limits, for in that case also there already exists a rule which would be merely destroyed by the extension. This however, the most frequent and important case of all, still needs a more accurate discussion. Such an anomalous law for example, it might be desired to use not for enlarging the exception contained in it but for the purpose of deciding, in accordance with it, a similar, actually undecided, question of law. Then the case for analogy would actually exist and the ground for rejecting it just established would be no longer suitable; and even in such a case the principle of anomalous law ought not to be used for the decision of it by analogy, but a cognate principle of the normal law is to be sought out for the purpose. For the whole procedure by analogy

(*b*) An example occurs in L. 32. S. 6. C. de apell. 7. 62. Comp. also Thibaut. logische Auslegung S. 20.

rests simply upon the innate coherence of the system of law, but the positions of anomalous law have sprung from heterogeneous principles, and have merely been tacked on to the system of law (S. 16.), wherefore the organically forming power of the normal law cannot be ascribed to them.

The Romans have very correct views of the completion of the law by analogy; only in the application they do not everywhere distinguish the developement of law from the pure interpretation; the grounds of this commingling will be more fully stated below. According to their theory also, in each undecided question of law, the law already given is to be extended, according to the rule of innate similarity and relationship, to the decision required.(c) The forms under which this organic extension of the law is effected, are especially FICTIONS(d) and *utiles actiones*. By their means withal, the innate coherence of the new with the old is secured and thus the systematic unity of the aggregate law preserved. An example, in which this procedure is exhibited on a large scale, is the BONORUM POSSESSIO, which in its complete developement must be considered entirely a *fiction* of the *hereditas*.(e) The

(c) L. 12. de Leg. (1. 3.) "ad similia procedere" L. 27. eod. "quae quandoque similes erunt." L. 32. pr. eod. "quod proximum et consequens ei est." L. 2. S. 18. c. de vet. j. enucl. (1. 17.), where Hadrian says the gradual completion of the edict must take place "ad ejus regulas, ejusque conjecturas et imitationes." Justinian himself mentions this case, not under the praetermissum in S. 16. eod. (which are the omitted texts of the old jurists) but under the new negotia in S. 18. How he would have it dealt with will be pointed out below.

(d) Comp. especially Gaius IV. S. 10. S. 33—38.

(e) Ulpian XXVIII. S. 12. L. 2. de B. P. (37. 1.) L. 117. de R. J (50. 17.)

old jurists however express themselves in the most determined manner against the analogical extension of any *jus singulare.*(f) This general rejection is also corroborated by several remarkable applications in particular cases. He *e. g.*, who buys a thing of an insane person whom he regards as sane, has by anomaly the right to the *usucapio:* one would however err in treating this sale as a valid transaction in other respects.(g) He who alienates as a pledge a thing, in the usucapion of which he is engaged, by anomaly carries on the usucapion; it would however be erroneous to ascribe to him, by way of consequence, any other possessory rights whatever, since these in their entirety appertain rather to the creditor.(h) When on the other hand in many other applications, an extension by analogy of anomalous propositions of law occurs, this rests upon the commingling of interpretation with the developement of law of which we shall immediately speak more at length.

SECTION XLVII.

EXPRESSIONS OF THE ROMAN LAW UPON INTERPRETATION.

When the Roman law recognizes the determinate power of the authentic interpretation(a) and at the

(f) L. 14. de Leg. (1. 3.). "Quod vero contra rationem juris receptum est, non est producendum ad consequentias" (repeated in L. 141. pr. de R. J.) L. 162. de R. J. (50. 17.) "Quae propter necessitatem recepta sunt, non debent in argumentum trahi."

(g) L. 2. S. 16. pro. emtore. (41. 4.)

(h) L. 16. de usurp. (41. 3.) L. 36. de adq. poss. (41. 2.). A similar proceeding is found in L. 23. S. 1. L. 44. S. 1. de adqu. poss. (41. 2.) L. 43. S. 3. de fid. lib. (40. 5.)

(a) L. 12. S. 1. c. de leg. (1. 14.)

same time that of the usual,(b) no peculiar view of law is contained in that recognition; it is rather a simple consequence of statute and custom being acknowledged as law-sources. Everything depends upon the place which the so called doctrinal (S. 32.), which alone is true interpretation, is to maintain, and on this point nothing at all is decided by the bare recognition of an authentic and usual interpretation.

Upon interpretation proper the old jurists in the Digest give rules, which have in great part been made use of above in connexion with the theory of interpretation explained by me, because this connexion was serviceable for mutual completion and illustration. These rules, as one might expect from the authors of them, are in themselves good but incomplete and in particular not calculated for the peculiar case of the Justinianean law-books which those jurists could not anticipate. If one compares their own practice with this theory established by them, that will be found not quite completely in accord with this. The practice often far oversteps the limits of genuine interpretation and assumes the character of a real developement of law. In particular they give explanations from the ground of the law, which not merely rectify the expression but have in view the improvement of the law, which therefore ceases to be interpretation: aye they not seldom extend by analogy even a *jus singulare*, although this is in direct contradiction with their own definitely expressed fundamental principle (S. 46).(c) These contradictions are explicable by the

(b) L. 23. 37. 38. de legibus. (1. 3.)

(c) Thus they extend to the bridegroom the forbidding of the alienation of the *fundus dotalis*. L. 4. de fundo. dot. (23. 5.) In like manner the free form of the military testament to civilians in an

peculiar position of the Roman jurists, which in truth placed in their hands the developement of law much more immediately than is supposable among us (S. 19). Thus then among them *Interpretatio* in no way means interpretation specially but generally, theory, tradition, everything therefore which has been designated above as scientific law (S. 14. 19. 20.) and indeed in the freer handling which could be allowed to them in Rome.(d) However the old jurists may even in their time have recognized the shifting boundaries thereby created, between their own vocation and the functions of the Praetor or even of the Emperor; this is the probable explanation of their leaving it undetermined in some texts, whether an extension of the law is to be effected by themselves, or rather by the Praetor or the Emperor.(e) Even setting aside however this greater freedom, which, in comparison with our own, was permitted to the Roman jurists, they had also a more extensive means of interpretation, inasmuch as they stood so close to the origination of their law-sources, consequently could absolutely know how, many an expression, in itself indeterminate, was intended and in what sense it was immediately applied by its authors.(f) In all these

enemy's country. L. un. de B. P. ex. test. mil. (37. 13.) Likewise the privileged competency of the husband to the wife. L. 20. de re. jud. (42. 1.) In these three cases it is a JUS SINGULARE which is extended.

(d) Upon this meaning of Interpretatio comp. L. 2. S. 5. de O. J. (1. 2.) Hugo Rechtsgesihichte S. 441. 11. Ausg. Puchta Gewohnheitsr. I. S. 16. foll.

(e) L. 11. de leg. (1. 3.) "*aut* interpretatione *aut* constitutione optimi principis" ... L. 13. eod. "*vel* interpretatione *vel certe* jurisdictione suppleri."

(f) Thus *e. g.* the Praetor had promised an interdict for the case of an *operis* novi nunciatio (L. 20. pr. de O. N. N.) (39. 1.) That was interpreted of an alteration of the soil and of such as supported a building (L. 1. S. 11. 12. eod.). In another place the edict said: "quod

respects we are placed otherwise than they, especially when we have to interpret not a law indigenous to us but that of Justinian standing at such a distance from us. Our situation is in that respect of more difficulty; but here as in many other cases, the exertion required by the difficulty has not remained fruitless. The conception and the limits of genuine interpretation have attained among us, to a higher degree of culture than they ever did among the Romans, upon whom a similar necessity was not imposed.

Under the Emperors, especially since the middle of the third century of our era, completely different relations gradually stepped in. The developement of law by edicts of the tribunals disappeared and the free position would hardly have been any longer compatible with the completely developed imperial authority; there could then scarcely be any further question upon the matter, for the scientific law still survived only in the books of the old jurists but personal successors to them scarcely appeared. Now at the most an interpretation of the judge would be possible, and it can be matter for little astonishment, when even this was subjected to wholly new and arbitrary conditions. This was first completed by Justinian but a beginning was already made at a much earlier period. Thus Constantine ordains:(g) "Inter aequitatem jusque interpositam

vi aut clam factum est (L. 1. pr. quod vi (43. 24.)) That also was merely interpreted of an *opus in solo* but this time not merely of buildings but also of fields, trees and such like (L. 7. S. 5. eod.) These limitations and distinctions lay not in the words and they were still less arbitrary; they were based upon the traditional acquaintance with the cases, and the needs, for which provision was to be made by the one edict and the other.

(g) L. 1. c. de leg. (1. 14.) or L. 3. c. Th. de div. rescr. (1. 2.) (newly discovered.) Comp. above S. 86. note *(f)*.

interpretationem nobis solis et oportet et licet inspicere." That is to say: "When by interpretation any principle of *aequitas* is to be introduced in opposition to strict law, that must be done by the Emperor alone." Obviously what is here spoken of, is not genuine interpretation but developement and indeed a conquest of *aequitas* in the province of the hitherto prevailing rigid law. This process, which in former times regularly proceeded from the edict of the Praetor, very often also from the jurists, is now reserved for the Emperor. There is nothing in this which one might not have already expected after the change in the constitution. An ordinance of Valentinian and Martian says, the Emperor has to remove obscurities in laws and to alleviate asperities. Partly however this vocation of the Emperor is not here marked out as entirely exclusive but procedure by consultations which had been long usual is pointed out as the safest way; one might partly from the connexion of the two propositions well suppose, that only such explanations of a written law were spoken of as embraced in themselves an alleviation, consequently a real changing of the law.(*h*) Lastly it is ordained that doubt upon a new law, not yet become certain through custom, must be laid before the Emperor.(*i*) It is however on this matter left undetermined whether the language is applicable to a doubt upon legal interpretation or perhaps directly to the existence of a completed customary law.

(*h*) L. 9. c. de leg. (1. 14.) ... "Si quid vero in iisdem legibus .. obscurius fuerit, oportet id Imperiali interpretatione patefieri, duritiamque legum nostrae humanitati incongruam emendari." This is perhaps the altered beginning of Nov. Martiani 4 in which the last words from "duritiam" do not stand.

(*i*) L. 11. c. de leg. (1. 14.). From Leo and Zeno.

Much more obvious and decisive are the ordinances which Justinian himself has given upon this matter. The first was published A. D. 529, shortly after the introduction of the older code.(k) The course of his thoughts is briefly the following: "We find in old laws(l) a doubt upon the question, whether the interpretations of laws proceeding from the Emperor have binding power. This subtle doubt is however altogether ridiculous and is set aside by the present constitution. Every interpretation of law proceeding from an Emperor, whether it results in a Rescript (*sive in precibus*) or in an imperial decision (*sive in judiciis*)(m) or in any other way (therefore *e. g.* in an authentically interpreting law) is to be considered binding and infallible. Then as in the present constitution, the Emperor alone can make laws so he alone can interpret them. Wherefore also should questions heretofore have been put to him by all tribunals doubting as to a law, if the privilege of interpreting it had not belonged to him alone ?(n) In other words who could remove the

(k) L. 12. S. 1. c. de leg. (1. 14.)

(l) In veteribus legibus invenimus dubitatum. By that texts of the old jurists may well alone be meant: perhaps texts of the earliest period of the imperial government when the binding power of the rescripts was not acknowledged to be undoubted – therefore certainly older than Gaius.

(m) The words admit of a double meaning. PRECES may denote all rescripts, JUDICIA the decrees so that for the remaining sorts there are the edicts and the mandates. PRECES may however be confined to the private rescripts so that the judicia would embrace the rescripts, in the procedure by consultations, as well as the decrees. The first explanation however appears to me simpler and more natural and the rather that the principium of the text deals with decrees therefore these have special stress laid on them.

(n) "Si non a nobis interpretatio mera procedit?"

obscurities of laws, but he who can give laws? Henceforth let therefore all doubts vanish, and it is the Emperor who is to be acknowledged not merely as sole law-giver but also as sole interpreter. However this direction is not to infringe in any way the right which in this matter has been granted to the old jurists by the Emperors."(o) In this enactment two wholly different propositions are involved: first the binding power of the imperial interpretation in whatever form it is given; secondly the forbidding of every private interpretation. The last is for our purpose peculiarly the new and important one; but the first however also needs some illustration. In this respect Justinian evidently means to prescribe nothing new here, but merely to enjoin and secure against vain doubt what would properly be otherwise of itself understandable. Hence he also determines nothing here as to the sort of efficacy of these imperial interpretations, but he leaves them in this matter entirely in their former situation. Consequently the interpretation in an Edict ought to be binding upon all, exactly like every written law: that in a decree, if it was a final decision, likewise upon all, therefore for other future cases also, as the *principium* of this text establishes: that in an interlocutory decree merely for the individual case: Lastly that in a rescript (which had never been published) likewise merely for the individual case in question. It is therefore quite erroneously that many think that the interpreting rescripts were, after this ordinance, to have the force of law for other future cases also (S. 24.),

(o) That is to say "the interpretations contained in the writings of Papinian &c., are to continue to have the legal force, which the ordinance of Valentinian prescribes." This ordinance was for the first time abrogated by the promulgation of the Digest four years later.

just as the *principium* certainly prescribes of decrees when they are final decisions: if one compares the two parts of this text with one another, one cannot be doubtful upon the entire difference of the expression as also upon the grounds of treatment of the two cases.

The second ordinance of Justinian upon interpretation is contained in the patent of publication about the Digest, A. D. 533, that is in L. 2. S. 21. C. de vet. jure enucl. (1. 17). It stands in connexion with the inhibition to write juristic works (S. 26.) and is in the following way the complement of it: "Books properly so called and especially commentaries upon the laws, are forbidden. If any doubt whatever is however discovered as to the meaning of a law,(*p*) the judges must lay it for decision before the Emperor, for he is at the same time the sole law-giver as also the only authorized interpreter."(*q*)

SECTION XLVIII.

EXPRESSIONS OF THE ROMAN LAW UPON INTERPRETATION.—(*Continuation.*)

These two accordant laws are so rugged in their contents, that at the first blush one might have hesitated about taking them quite literally. However this doubt must vanish in presence of the frequent repetition of the exclusive privilege of the Emperor in interpretation, still more in presence of the constantly recurring

(*p*) "Si quid vero ... *ambiguum* fuerit visum" etc. This must by no means be understood merely of ambiguous expressions in a law, since from Justinian's stand-point these could not possibly be regarded as anything strange, but it denotes doubt and difficulties of every kind therefore every need of interpretation in general precisely as the *omnes ambiguitates judicum* in L. 12. S. 1. cit.

(*q*) "Cui soli concessum est leges et *condere et interpretari*."

parallel between legislation and interpretation: for since no one but the Emperor could make laws, so by reason of the completely similar position of the two occupations, no one but he ought to interpret them. In fact too in this there was merely a consistent carrying out of the same fundamental principle, which led to the prohibition of all future legal science (S. 26). It is true, that a free interpretation permitted to the judge, is conceivable in presence of this prohibition; that Justinian had no such intention, is perfectly plain from the second ordinance, which simply imposed upon the JUDGES as a positive obligation the enquiry from the Emperor as to every doubt upon the meaning of a law. In what Justinian actually directed he was perfectly consistent. To every one, jurist or judge, who came into contact with the laws, a mechanical procedure only was to be permitted, each free exertion of intellect to be forbidden. All these directions were manifestly of a piece. In truth one might look upon it as an inconsistency, that Justinian likewise prescribes the seeking for a harmonization of apparent contradictions *subtili animo* (S. 44.); but this must not be conceived to be an intellectual interpretation, which certainly is not in his thoughts, but as a searching about for a hidden word in which the difference of the cases was indicated, consequently again as a purely mechanical occupation. Further it might appear inconsistent, that so many directions as to interpretation, conceived in a very liberal sense, are admitted into the Digest, if the judge was not to be permitted to apply them. But beside these directions do not rules as to the composition of the laws also stand ?(a) And still Justinian would

(a) L. 3, 4. 5, 6 & 8. de leg. (1. 3.) L. 2. de const. princ. (1. 4.)

certainly not by that, offer to his subjects a share in the work of legislation. Both sets of rules were first of all to declare in what way the Emperor would give and interpret laws, and also at the same time to serve as indications for those functionaries, who might be employed by him in these occupations. In this therefore there was no inconsistency.

Our jurists have in truth attempted the following milder explanation of these ordinances. Genuine interpretation, resting upon the rules of Hermeneutics, was to remain completely free. With respect only to wholly incomprehensible, incurable, laws which are past mending by all hermeneutics, the interpretation is directed to be reserved for the Emperor.(b) But first of all I do not believe that there exist laws in which the art of interpretation must be entirely despaired of. Especially however is an ordinance of this meaning wholly inconceivable in the mouth of Justinian. He is so penetrated with a consciousness of the brilliant success of his undertaking, that he distinctly asserts that his law-books throughout contained no contradictions, which nevertheless could hardly be avoided by the greatest diligence; and would he at the same time admit, that in his completed law-books, wholly incomprehensible,

(b) Thibaut. logische Auslegung. S. 25. 47. 112. Hufeland Geist des Römischen Rechts I. S. 121. Mühlenbrüch. I. S. 54. Hufeland has however the peculiarity that he narrows this explanation to L. 2. S. 21. cit; on the other hand he (S. 46—51.) explains the prohibition in L. 12. S. 1. cit as prevailing only in cases in which the Emperor has already actually interpreted. The text however contains no trace of this limitation, indeed it is completely refuted by the ground, by which the direction is to be put beyond doubt "to what purpose the questions if interpretation were not the calling of the Emperor alone?" At the time of a question (consultatio), the Emperor had certainly not yet interpreted.

therefore utterly bad laws would be found? Would he moreover have regarded this case as so important and of so frequent occurrence as to find it necessary to promulgate, in two different years, ordinances with respect to it? Every general consideration therefore compels the entire rejection of this explanation; incredibly weak moreover are the special grounds which have been adduced in justification of it. In L. 9. c. de leg. stands, say they; *si quid obscurius fuerit;* that denotes an impenetrable obscurity. Setting aside however the fact that the expression does not even appear in Justinian's own ordinances, of which the meaning is the sole question here, this comparative used absolutely has rather an attenuating meaning; it implies: some degree of darkness, not altogether clear. Further, say they, the older ordinance calls that which it reserves to the Emperor: *legum aenigmata solvere;* that means: to throw light upon the obscure; but in the idea of a riddle insolubility is so little involved, that a riddle is ordinarily invented merely for the purpose of being solved. It is also clear from other passages of Justinian that in his somewhat bombastic phraseology, *aenigma* denotes every difficulty, and by no means the invincible difficulty only.(c) That explanation of Justinian's ordinances, appears therefore in

(c) In L. un. C. de nudo j. quir. (7. 25.) it is said: nec *jure Quiritium* nomen quod nihil ab aenigmate discrepat. We already knew the meaning of this technical expression tolerably well through Ulpian; since Gaius we know it very much better; in Justinian's time when they had so many complete Institutes, &c., the difficulty was far less still. In like manner L. 1. S. 13. C. de vet. j. enucl. (1. 17.) forbids the *siglorum compendiosa aenigmata.* The meaning of the abbreviations people could acquire from every copyist, there existed already in that time works in which they were explained, *e. g.* that of Valerius Probus. In both texts therefore *aenigma* does not mean anything unfathomable but something

every point of view so wholly unsustainable, that its distinguished partisans would certainly not have had recourse to it, if they had not been urged to it by a feeling of its extreme necessity; that necessity however and the remedies for it will be discussed in the following section.

Since the meaning of Justinian's ordinances has now been established, we have still to add how he contrived the procedure, by which they were to be carried out in practice. It is clear that he was to be consulted in every doubt upon the meaning of a law. These questions however were not by any means to lead to authentic interpretations by means of Edicts, but merely to Rescripts which had binding power as to the existing case but no further; and this condition of the matter appears also to have maintained itself unchanged in the time following. Then when Justinian, eight years after the introduction of the Digest, in novel. 113, declared private rescripts unbinding (S. 24.), he expressly added that consultations and rescripts as to the interpretation of laws were to continue to exist as before. Still later (A. D. 544.) the Novel 125, forbade consultations also (S. 24.) and in fact without that express reservation (in Nov. 113). However the same reservation must be tacitly added in thought; for it is wholly inconceivable that Justinian would now have, indirectly and furtively as it were, again given free scope to private interpretation which he had, repeatedly and in the most solemn manner, forbidden. Without doubt the prohibition applied only to the peculiar consultations which yielded up the case itself

that one must learn, that which one cannot already have learned by every day experience, therefore not without some effort.

to the Emperor for determination, therefore for him to compose, as our faculties might do, a decree instead of the judge doing it himself. The consultations for the sake of legal interpretation, were not to be touched by the provision.

However this course of business, plainly prescribed by Justinian, is not without practical difficulty. One might suppose that he must have been so overloaded with questions, that he would scarcely have been able to give further thought to the other matters of government. Let us not deceive ourselves on the matter by our perceiving that even those among our judges not especially learned, nevertheless find themselves tolerably well at home with the laws of Justinian. By their side stands the friendly help of some group of colleges or of a law book, which furnishes them in the most convenient manner with the refreshing fruit of the labour and traditions of seven hundred years. Let us now however think of this labour of seven hundred years as out of the way, and of the *Corpus juris* face to face with a judge, relegated to his own personal strength, ignorant, as all judges must have been if Justinian's prescriptions as to legal science had hitherto been followed. I believe that with such a judge, if only he were conscientious, scarcely a court-day would pass over without questions for the legislator, who however in a large state would no longer be able to conquer the labour required of him, merely for keeping the machine of judicial administration in daily progress. However this consequence could not have shown itself in Justinian's empire; otherwise he would hardly have repeated,(d) eight years after the introduction of the

(d) Nov. 113. C. 1. pr. A. D. 541.

Digest, the prescription of questions for the purpose of interpretation, for in that time sufficient experiences must have been collected. This remarkable appearance is explained by two opposing forces not seldom being capable of leading to the same end. Intelligence and knowledge will not have even once allowed the necessity of a question to occur to the judge, to whom the interpretation is permitted. In Justinian's empire, the judge to whom he had forbidden interpretation, may have assisted himself by thoughtlessness and arbitrariness, without having recourse to more frequent questions than the Emperor was in a condition to dispose of.

SECTION XLIX.

PRACTICAL VALUE OF THE ROMAN EXPRESSIONS UPON INTERPRETATION.

Now that the Roman determinations as to interpretation have been set forth, it remains to examine what value for us those determinations have, in places in which the Roman law in general prevails. This question is obviously related to, but at the same time different from, the question already answered as to the law-sources (S. 27.); for there the question was as to the generation of law which of itself belongs to public law; here the question is as to the adoption of the law, therefore of the conduct of the individual in presence of it, and why should the Roman law not be able to furnish the rule for that matter just as well as for every other which concerns individuals?

It is necessary however at once to exclude on formal grounds a constitution of Justinian, the L. 3. C. de *vet jure enucleando*, since this belongs to the restored texts

(S. 17). However this exclusion is altogether unimportant, since that text is merely the Greek of that immediately preceding (L. 2. eod.), has therefore no proper contents of its own, different from the latter.

Now one part of the texts, which are ordinarily assigned to this place, is unquestionably decisive; I mean those ordinances of Justinian, in which he expresses himself upon the destination of his law-books and of their several parts. When *e. g.* he says, the texts of the jurists in the Digest must not be regarded as mere instructions but as genuine laws proceeding from himself, this is less a rule of interpretation than a part of the patent of publication; since it does not relate properly to what we have to do, but to the sense of that which he himself does. Something similar in fact, only in a much more round-about way, may be said also of the rules of interpretation proper for they have in fact the following meaning: "all texts of the Digest and the Code are to be understood according to the rules of interpretation here given, since I have admitted the passages, on a pre-supposition of those rules. In the same manner my future laws, and the laws of my successors, are to be understood, for we will constantly exercise our legislative power on this pre-supposition." Then the rules of interpretation would, in reference to each particular text, already be a sort of authentic interpretation. This view would then lead us to the following further conclusion. The Roman rules of interpretation might be applicable to and legally binding for Justinian's law-books and for the laws of the succeeding Greek Emperors, if these had been received by us; they could not however be applicable to the Canon law, the laws of the Empire and our written laws of the land; for Justinian could

not possibly have meant to determine, as by a legislative *fidei-commiss* to all times, in what sense in future, Popes, German Emperors, or German Princes, would exercise their legislative power.(a)

Thus the matter stands according to a general, purely formal treatment, and hence a very extensive sphere of influence would be secured to the Roman rules of interpretation, namely over Justinian's law-books which are precisely the most important case for the application. If however we look at the special contents of those rules, we rather arrive at the conviction, that even in this very application, they have not a legally binding power. The most important of all these rules is unquestionably that which we find in two ordinances of Justinian (S. 47. 48.); it tells us quite distinctly how we are to interpret, namely not at all. Clearly on two grounds we cannot recognize as law, this most important rule.

First because it stands in inseparable connexion with Justinian's forbidding the writing of juristic books (S. 26). This connexion is clear not merely from the contents and aim of the two prescriptions but also from their framing, inasmuch as they stand, immediately next to one another, in the new ordinance, and the more so, that the one is expressed as the consequence and more minute determination of the other. Since

(a) The comparison with the following case of an opposite kind, will make this still plainer. In the Prussian Landrecht King Frederick William II. has admitted rules upon interpretation. These were valid for the Landrecht itself, for later laws of the same king and for all laws of his successors; then his law is also binding as to the exercise of the regal power by his successors, until it has been abrogated. Here also therefore is the ever reappearing contrast of public and private law.

now the inhibition of scientific books has not for us the force of law (S. 27.), so also that with respect to interpretation cannot have such force; if we would permit this, torn from its context, to prevail alone, it would in fact be no longer Justinian's prescription, but something which we have arbitrarily made up out of it, and in which only a verbal appearance of his prescription would be found.

Secondly because the carrying of it out in practice is not merely difficult but completely impossible; for Justinian renders the interpretation of the judge dispensable with, by imperial rescripts; such an institution however is found in no modern state. Let us not delude ourselves with the resource of an authentically interpreting law(b); no judge has the power of bringing about such a law, he has not a right to delay his decision until the appearance of such a law; above all however this would not be what Justinian desires but something wholly different. In like manner let us not delude ourselves by means of a reference to a law commission or a ministry of justice, which, it is true, are in some countries in the habit of imparting such instructions(c); for this also is something quite different, and it is sufficiently clear, from what we know of the character of Justinian, that he was

(b) Thibaut abhandlungen S. 102. Comp. on the contrary Löhr Magazin III. S. 208. who only wrongly hesitates because of the authentic interpretation then acquiring a retroactive effect. This however it has always had as will be shown below. Comp. in the mean time Nov. 143. pr.

(c) Such a law commission, with a binding power of interpretation, formerly existed in Prussia but has since been abolished. Comp. below S. 51. note (c). There however the lands subject to the common law are spoken of.

perfectly in earnest as to the personal operation of the Emperor upon interpretation. If moreover we once arrive at the belief in the necessity of getting over Justinian's actual direction by means of some substitute or another, why then should we stop half way and not rather take advantage of our natural freedom?

It was a feeling of this necessity which led to the forced explanation above stated (S. 48.), of Justinian's ordinances; but no justification of a procedure so completely arbitrary is created by that necessity. It would be better to say without any contest, Justinian has in fact forbidden private interpretation but a general customary law has in turn abrogated this prohibition.(d) At least in the whole of legal history, scarcely any example occurs, in which a general custom would be so beyond doubt, as that of private interpretation from Irnerius to our own day. From out of our stand-point, we cannot indeed admit such a derogating custom, since we no doubt ascribe no applicability to the Roman prescription in itself; and this very assertion is now directly corroborated in the fullest manner by the demonstrated impossibility of the application. Then this impossibility is easily grounded upon Justinian himself having placed his inhibition in inseparable connexion with a political institution, that of the imperial rescripts, which has now disappeared. Hence he has made it a part of public law and according to our general principles (S. 1. 17.), we must consequently deny its applicability to the present time.

(d) Zachariä Hermeneutik S. 164. puts it nearly in this way, but with the erroneous addition that the law of Justinian itself is hesitating on this point since some texts permitted interpretation, others forbade it; this vacillation has been determined by our practice in favour of the permissibility.

If we compare the final consequence of the view here expounded, with that which is derived from that strained explanation of others, the two results are not in fact different. They allow Justinian's prohibition to have the force of law, but limit it to the in fact non-existent case of laws completely meaningless. Here the sense of the prohibition is recognized in its full meaning, at the same time however its applicability to modern times is wholly denied.

All these reasons apply merely to Justinian's prohibition of interpretation; the rules in the Digest as to interpretation might, so far as they are concerned, maintain the force of law with us. Still I hold it to be more consistent to deny this power to these rules also and therefore to allow the different determinations of the law of Justinian upon interpretation, to stand or fall together. Every severance of this sort is always a half measure: apparent maintenance amid essential changing; for who can say what other rules might have appeared good to Justinian, if private interpretation had appeared to him generally admissible? This question is no longer of practical importance; for entirely new precepts upon interpretation, by which our general views would be positively changed, are not to be found in the Digest; moreover by our assertion, neither is the regard to an authority commanding respect withdrawn from them, nor the instruction which we can draw out of them, from us. They have also been already hitherto employed by me in that way, with the theory of interpretation here attempted.

SECTION L.

VIEWS OF THE MODERNS UPON INTERPRETATION.(a)

In the course of my own exposition mention has constantly been made of the differing views of modern jurists. In conclusion a summary ought to be given of those views upon certain main points, which exercise special influence upon this theory in its entirety.

To those main points belongs first of all the very generally prevailing conception of interpretation as an ENLIGHTENING OF OBSCURE laws.(b) Inasmuch as a casual and indeed faulty condition of laws is made the condition of its existence, interpretation itself possesses the accidental nature of a mere escape from an evil, whence it naturally follows that it must become more dispensable with, as the laws become more complete.(c) Now no one will deny that interpretation is especially important and necessary for obscure laws, and that with respect to them the art of the interpreter may often show itself with peculiar brightness: for this reason also the greater part of the rules expounded are concerned with the case of defective laws (S. 35. fg.).

(a) I here appeal to the following jurists, partly as exhibiting great wealth of materials, partly as capable of serving as representatives of the most current opinions; Chr. H. Eckhard hermeneutica juris ed C. W. Walch Lips. 1802. 8. Thibaut Theorie der logischen Auslegung des R. R. 2te. Ausgabe. Altona 1806. 8. Mühlenbruch I. S. 53—67. Especially free from prevailing conceptions (misconceptions) and rich in thoughts of his own is here as elsewhere Donellus I. 13. 14. 15.

(b) Forster de j. interpret. I. 1. Hellfeld S. 29. Hofacker I. S. 149. 151. 152. (Hübner) Berichtungen und zusätze zu Höpfner S. 173. Hufeland Lehrbuch des Civilrechts I. S. 28. The Romans regarded the matter otherwise. L. 1. S. 11. de inspic. ventre. (25. 4.) "Quamvis sit manifestissimum Edictum Praetoris, attamen non est negligenda interpretatio ejus.

(c) Zachariä Hermeneutik S. 160. says this in so many words.

Two considerations however will exhibit to us that mode of seizing the fundamental concept as too narrowed and as detrimental to the whole theory. In the first place a fundamental and exhaustive treatment of the diseased condition is impossible, if a foundation has not been laid by the examination of the healthy condition to which that is to be referred. Secondly by that mode of embracing the idea, the noblest and most fruitful application of interpretation, which consists in revealing the whole richness of their contents and relations in texts not faulty therefore not obscure, entirely disappears from us; a procedure which is of such special importance in the Digest. When moreover one takes this arbitrary limitation of interpretation to obscure laws in connexion with the opinion above quoted, according to which again very obscure laws were withdrawn by Justinian from interpretation (S. 48.), out of the two together arises the singular conclusion—that to enable laws to be fit objects for interpretation, they must be neither too clear nor too obscure, that they must rather find themselves in a narrow compass of moderate obscurity.

Secondly the division of interpretation into GRAMMATICAL and LOGICAL is another of those opinions.(d) These are not at all conceived as elements of every interpretation, which must constantly work together throughout with the difference only that, according to circumstances, sometimes the one, sometimes the other element may be more productive (S. 33.), but rather as opposed to and exclusive of one another. The grammatical is to proceed merely according to the meaning

(d) Eckhard S. 17. 23. Thibaut Pandekten 8te. Ausg. S. 45. 46. 50—52. Thibaut logische Auslegung S. 3. 7. 17—29.

of the words, the logical merely according to the intention or ground of the law: the grammatical is as a rule to prevail, the logical only to be exceptionally permitted. In this contrast the only thing clearly conceived and generally admitted, is that logical interpretation is such as takes no small liberties, and such as must therefore be kept under control: moreover the most heterogeneous matters are collected under this expression. Thus the correction of the expression according to the actual thought of the law (S. 35. fg.) serves for logical interpretation; but also the enlarging by analogy; and lastly yet a third process which will directly be spoken of more at length. If now the explanation of the tasks presenting themselves in interpretation, which has been above given, is correct and exhaustive, that division must at once be given up; the adduction and explanation of it has certainly rather obscured than assisted the object-matter.

Thirdly and this is the most important, they have drawn into the province of interpretation a handling of laws, which must in fact be regarded as an altering of them and nevertheless this has been comprehended under the name of logical interpretation. We have spoken above of a rectification of the expression by referring it to the actual thought; here a rectification of the thought itself is attempted by referring it to those thoughts which the law ought to have contained. One goes back, that is, to the ground of the law and when it is found that the ground, in its logical developement, leads to more or less than the law embraces, this will be improved by a new sort of EXTENDING or NARROWING interpretation. For that purpose it is indifferent whether the legislator has consciously

committed a logical mistake or whether he merely neglected to think of the consistent applications of the ground by means of which they now set him right; in the latter case therefore it is presumed that he would infallibly have so arranged it, if his attention had only been called to these consequences. This at least is the aspect of this procedure completely carried out. It is however also made use of with the modification that an extension according to the ground of the law is permissible but never a narrowing of it;(e) however it would be difficult to give a convincing ground for this distinction.

Inasmuch now as by this procedure the interpreter undertakes to improve not the mere letter, therefore the appearance of the law, but its actual contents, he puts himself above the legislator and consequently misconceives the limits of his own calling; it is no longer interpretation which he practises but actual developement of law.(f) Such a confusion of boundaries between essentially different activities is a sufficient ground in point of form, for wholly rejecting this sort of interpretation, and, according to the true conception of the office of judge, for wholly denying his liberty to adopt it. There are however still two objections to the process inherent in the thing itself. The first

(e) Thibaut. Pandekten S. 51. 52. He permits the extension in two different cases according to the ground and the intention; the limitation according to the ground alone. He means by intention (absicht) generally what I denote as the actual thought of the law.

(f) The objection to this unauthorized procedure, has been converted in many to the opposite one-sided view according to which all interpretation appertains in general not to the judge but to the legislator, who might however, it is true, delegate it. See above S. 32. note (d).

consists in the frequent uncertainty of the ground of the law; where now upon the nature of this an error is very possible, that procedure must degenerate into complete arbitrariness, and all legal certainty, by which laws may evidently be so beneficial, be destroyed.(g) The second cause of hesitation lies in the possible existence in the train of thought, of middle terms by which the legislator might, without inconsistency, have been determined to assign to the law a wider or narrower province than that to which the ground of the law seems to lead. We must consequently be on our guard against the deluding appearance of logical certainty by which this procedure is customarily applied.(h) Only where these material causes of hesitation could be removed by thorough enquiry, such an extension or restriction according to the ground of the law, must be held permissible and advisable, not as interpretation but as a consistent developement of law. Even the nature of anomalous law does not stand in the way of such a developement although through that nature the application of analogy must be shut out from the judge. (S. 46).

That this procedure however is customarily accepted by the modern jurists as genuine interpretation and consequently (with more or less limitations) permissible to the judge, is explained by the very usual interchang-

(g) That is the true meaning of L. 20. 21. de leg. (1, 3.). "Non omnium, quae a majoribus constituta sunt, ratio reddi potest. Et ideo rationes eorum quae constituuntur inquiri non oportet : alioquin multa ex his quae certa sunt, subvertuntur." The *inquiri non oportet* is not to be understood as a declaration against enquiry into the ground in itself, but merely in so far as it is to be applied in modifying the actual contents.

(h) Excellent remarks upon this matter are found in Stahl Rechtsphilosophie II. S. 177.

ing of this case with apparently similar cases in which a freer procedure is in fact permitted and necessary. Among those cases is first the real extending and restrictive interpretation by which the actual contents of the law are not (as in that process) improved, but merely asserted and defended against the appearance of the letter (S. 37). A second similar case, with which that erroneous process is confounded, is that of analogy (S. 46). In this case however there is a complete want of a rule of law, which therefore is to be enlarged by an artificial extension of the existing law-sources; in that erroneous procedure on the contrary, a rule of law is actually existent, which is however to be excluded from application by artificial extension of another law. The third case, which in the last place is accustomed to give occasion to such a confusion, has not hitherto been mentioned at all. It relates to such acts as violate the law not indeed according to the letter of it but according to the spirit (*in fraudem legis*). That the law ought to be applied to such acts is undoubted.(*i*) People are accustomed to think of this matter, as if the law evaded, must be extended by analogy. When *e. g.* usurious interest is promised under the appearance of a contract of sale or of a conventional penalty, they assume that the legislator has merely not thought of these cases: if his attention had been called to them, he would, in a supplement to the usury law, have forbidden these contracts also and since he has

(*i*) L. 29. de leg. (1. 3.). "Contra legem facit qui id facit quod lex prohibet: in fraudem vero, qui salvis verbis legis sententiam ejus circumvenit." L. 5. c. de leg. (1. 14.). "Non dubium est in legem committere eum qui verba legis amplexus contra legis nititur voluntatem. Nec poenas insertas legibus evitabit, qui se contra juris sententiam saeva praerogativa verborum fraudulenter excusat." L. 21. de leg. (1. 3.). L. 64. S. 1. de condit. (35. 1.).

passed over the matter, we must now come to the aid of his thoughtlessness with an extending interpretation. In fact however the matter stands quite otherwise. We have not to interpret the law, which is quite specific and sufficient, but the individual act.(k) If we apply to this the maxim as to simulation, we must treat the apparent sale or conventional penalty as an actual contract for interest and we therefore in this treatment, correct by our decision the letter according to the actual thought. It is essentially the same procedure, that has in other cases been applied to laws (S. 37). Only with respect to legal transactions this procedure will often carry with it a still higher degree of certainty; for in laws we have to do with an unaptness in the use of the expression, in transactions in the case supposed with a dishonest intention; this however will often be much more certainly recognized from the circumstances than that. Besides these confusings however, yet another circumstance has induced to the favouring of the erroneous sort of interpretation here set forth: the example of the Roman jurists who in fact apply this process and experience no hesitation in doing so. In their proceeding however there is no justification for us, for with the Romans it is connected with the wholly peculiar position of the jurists, which allowed to them such an immediate influence upon the developement of law as cannot be permitted to our own, be they writers or judges.(l)

(k) It might be objected, that the Romans actually regarded the treatment of this case as legal interpretation, by reason of L. 64. S. 1. de condit. (35. 1.). "*Legem* enim .. adjuvandam *interpretatione*. But they use the expression *interpretatio*, altogether in an extended sense, for every scientific proceeding (S. 47. note (*d*).

(l) Compare above S. 19. and S. 37. note (*g*).

SECTION LI.

EXPRESSIONS OF THE MODERN CODES UPON INTERPRETATION.

The modern Codes contain still fewer determinations upon interpretation than upon the law-sources (S. 31). The French code says nothing at all upon the matter; but the absolute direction given to the judge to decide every case without regard to the obscurity of a law, and the peculiar position of the court of cassation, render undoubted the way in which this object-matter is conceived in the French law. The Judge has there complete liberty of interpretation, but at the same time the certainty and harmony of the law are protected against the danger of arbitrary interpretations by the supremacy over all courts of the court of cassation, which can exercise its instructing and curbing influence even in cases in which the rules of procedure no longer permit an actual alteration of the particular decision. This solution of the problem would be amply sufficient, if the court of cassation had the right of pronouncing a decision of its own, instead of a mere quashing decision. It is however merely competent, after it has quashed, to relegate the deciding to another court so that a decision built upon erroneous legal principles, and the quashing of it in the very same case, may be several times repeated. This circuitous and costly procedure was produced by the fact that in the old constitution, the procedure by cassation did not take place before a court at all but before a high administrative body (the *conseil du roi*), which was merely to obviate the violation of law, not itself declare law. This reason has vanished since the revolution because now a special court of cassation exists, which forms an express court and enjoys like independence with all

other courts. In recent times, they have sought to remove the evil mentioned. The first attempt at doing so was however not adequate.(a) The latest law, which renders it absolutely incumbent upon the tribunal, to which the matter is remitted after the second cassation, to base its decree upon the legal principle expressed in the decision of the court of cassation, is much more effective.(b)

The Prussian Landrecht prescribes that the judge is to assign to the laws that meaning which may result from the words and their context or from the proximate undoubted ground of the law.(c) More important was the determination, approximating to that of the law of Justinian, that the Judge must indicate each doubt upon interpretation to the law commission and then follow their decision. This arrangement has however since been abolished; the judge, who now interprets and decides independently, has merely to indicate his doubt to the head of the department of justice *(chef der Justiz)*, whereby it may be made useful for legislation.(d) In case of a gap in the law, the judge is directed to decide according to the general principles of the Landrecht or according to the provisions for like cases; he is likewise to point out the supposed

(a) Loi du 16. Septembre 1807. Loi du 30. Juillet 1828.

(b) Loi du 1. Avril 1837. (Bulletin des lois IX. e. Serie T. 14. P. 223) art 2. "Si le deuxième arret ou jugement est cassé pour les mêmes motifs que le prémier, la cour royale ou le tribunal auquel l'affaire est renvoyée se conformera à la décision de la cour de cassation sur le point de droit jugé par cette cour.

(c) Allg. Landrecht Einleitung S. 46.

(d) A. L. R. Einl. S. 47. 48, und. Anhang S. 2.

gap in order that it may be filled up by a new law.(e) In the Rhenish provinces, where the French legislation still subsists, the French procedure has been so far changed, that the court of cassation, when it quashes, likewise itself pronounces the new decision. Besides for all the rest of the country a procedure of cassation has been newly introduced under the name of *Nichtigkeitsbeschwerde* (complaint of nullity) in which the judge who takes cognizance of it (the *Geheime Obertribunal*) when he annuls the previous decision, at the same time himself pronounces the decision.(f)

The Austrian code, in the last place, refers the judge to the peculiar meaning of the words of the law in their connexion and to the clear intention of the legislator. If a law is wanting, the decision is to be in accordance with the laws for similar cases and according to the grounds of cognate laws; if this is not sufficient according to the principles of natural right (law). The Roman inhibition of private interpretation is here changed into the unhazardous rule, that the legislator alone may explain laws in a manner generally binding.(g)

If we ask in the last place what is desirable for our situation and for our needs, it seems undoubted, that genuine interpretation should be freely allowed to the judge, but that what is considered interpretation merely through misunderstanding, should as a rule be denied. Since however in particular cases the boundaries between genuine interpretation and what is

(e) A. L. R. Einl. S. 49. 50.

(f) Verordnung vom 14 Dec. 1833 S. 17. (Gesetz sammlung 1833 S. 306.).

(g) Osterreich. Gesetzbuch. Einleit. S. 6. 7. 8.

properly developement may be very doubtful (S. 37.), it is desirable that there should be some high authority, in which the two privileges may be found united and that its activity should consequently not be hindered by the doubt as to those limits. If there exists a body of functionaries mainly designed for the developement of law, it is undoubted that they would also have to exercise their calling, wherever the existence of a doubtful interpretation of law gives occasion for it. Even where however no such body of functionaries exists, and even in presence of such a body, the right to this interpretation operating without control, may without hesitation be confided to a tribunal which holds a position in general similar to that of the French court of cassation. This would then exercise a similar influence and afford advantages to the practice of law similar to those of the Praetor and the jurists in ancient Rome, so that to it would be specially confided every sort of extending and restricting interpretation which has been above banished, as a procedure not conformable to the real function of a judge, from the province of genuine interpretation.

SECOND BOOK.
THE JURAL RELATIONS.

CHAPTER I.

SECTION LII.

ESSENCE OF THE JURAL RELATIONS.

The common nature of the jural relations in general and how they form themselves into classes in the relations of public and private law, have been explained above (S. 4. 9). The nature of those of them, which belong to private law, is now to be more fully unfolded; these alone appertain to our undertaking and hence they will from this time be designated, without any addition by way of limitation, as JURAL RELATIONS.

Man stands in the midst of the outer world, and the most important element, to him in this surrounding of his, is the contact with those who are like him, by their nature and destination. If now in such contact free natures are to subsist beside one another mutually assisting, not hindering themselves, this is possible only through the recognition of an invisible boundary within which the existence and activity of each individual gains a secure, free space. The rule, by which those boundaries and that free space are determined, is the law. Hence at the same time the relationship and the difference between law and morality comes to

be understood. The law serves morality, not by performing its bidding but by securing the free developement of its power indwelling in each individual will. The existence of law is however a self-dependent one, and hence there is no contradiction when in the individual case, the possibility of immoral exercise of a right actually existing, is asserted.

The necessity and existence of the law are a consequence of the imperfection of our condition, not however of a casual, historical imperfection, but of such a one as is inseparably bound up with the present stage of our existence.

Many however, in order to discover the idea of law, set out from the opposite stand-point, from the idea of wrong (not right.) Wrong is with them a disturbance of freedom by a freedom foreign to it, which is a hindrance to human developement and must hence be banished as an evil. That which wards off this evil is with them, the law. According to some it was produced by a conscious coming to an agreement, so that each gives up a portion of his freedom in order the more securely to protect the remainder; according to others by the institution of an external force which could alone put a restraint upon the natural inclination of men to their mutual destruction. By their thus placing the negative at the head, they treat the matter as if they meant to set out from a condition of disease in order to recognize the laws of life. The state appears to them as a defence against danger which, on the presupposition of the diffusion of righteous inclinations, might disappear, instead of standing out in such a case with more brightness and power, as according to our view, it would do.

From the stand-point now gained each single jural relation appears to us as a relation between person and person, determined by a rule of law. This determination by a rule of law consists in the assignment to the individual will of a province in which it is to rule independently of every foreign will.

Hence in each jural relation two parts may be discerned: first, a matter, that is to say, that relation in itself, and secondly the just determination of this matter. The first part we may designate as the material element of the jural relation or as the bare matter of fact in itself: the second as its formal element by which the matter of fact relation is raised to the form of law *(jus)*.

However not all the relations of men to men belong to the province of law since not all are susceptible and in need of such a determination. In this point of view three cases are distinguishable. Relations of men which entirely, others which do not at all, others again which only partially belong to the province of law or are governed by the rules of law. Property may serve as an example of the first class, friendship of the second, marriage of the third, for marriage partially falls within the province of law, partially lies outside of it.

SECTION LIII.

KINDS OF THE JURAL RELATIONS.

The essence of the jural relation has been defined as a province of the independent mastery of the individual will (S. 52). It is our first business therefore to search out the object-matters upon which the

will can possibly exercise influence and thus extend its mastery; hence a summary of the different sorts of possible jural relations will of itself result.

The will may, in the first place operate upon the willer's own person, secondly outwards therefore upon what, in reference to the willer, we must call the outer world: this is the most general of the conceivable contrasts of that operation. The outer world however is composed partly of un-free nature, partly of free beings homogeneous with that which wills, that is to say, of extraneous persons. Thus in the pure logical treatment of the question proposed, there appear to us three main object-matters for the mastery of the will; hence, it would appear, that three main sorts of all jural relations would of necessity be admitted. We have therefore next to examine those object-matters singly, and first the individual person as object of a special jural relation.

On this matter the following view is very prevalent. Man, say some, has a right to his own self which necessarily arises at his birth and can never cease so long as he lives; for this precise reason it is called an ORIGINAL RIGHT in contradistinction to all other rights, which come upon men first at a later period and accidentally, which are also of a transitory nature and are hence called ACQUIRED RIGHTS. Many have gone so far in this opinion as to ascribe to men a right of property in their intellectual powers and to derive from that right what is called liberty of thought; however it is altogether inconceivable how one man could by any possibility hinder another from thought or by inversion think in him, and how he could, by either of these ways, effect an encroachment upon this pretended

right of property. Say that they betake themselves to a more intelligible position by confining that right of property to the visible manifestation of the person, the human body and its individual members, this view has at all events meaning, as an exclusion of a certainly possible violation of this right, it is however on that account none the less unprofitable, even censurable because among other objections it consistently leads to the recognition of a right to commit suicide. The true element however in that erroneous hypothesis of an original right directed to one's own person, is the following. In the first place the rightful power of men over themselves and their own faculties is in truth not to be doubted; more, this power is even the basis and preliminary of all genuine rights, for *e. g.* property and obligations are only significant and valuable to us, as an artificial extension of our own personal faculties, as new organs artificially added to our nature in essence; but that power does not need recognizing and determining by positive law and the incorrectness of the conception here set forth consists in that natural power needing to be placed, as superfluously as erroneously, in the same line with its artificial extensions and to be treated as homogeneous. Secondly, the precise end of many special actual institutions of law is no doubt to be sought in the securing of that natural power of men over their own selves against foreign interferences. To that head belongs a large part of the criminal law, moreover in civil law the numerous important rights which aim at the protection against injury to the reputation, against fraud and against force, therefore also among others the possessory remedies. Of all these rights the inviolability of the person is no doubt the final ground; nevertheless they

are not to be regarded as mere developements of this inviolability, they rather form wholly positive institutions of law of which the special contents are completely different from that inviolability itself. If one is inclined however to represent them as rights over one's own person, their true nature will be merely obscured by this mode of designation. The putting together of those institutions of law, which have this common point of departure, can never be regarded as fruitful and instructive: it is sufficient to recognize their relationship generally.(a)

If henceforth we entirely separate the so-called original rights and recognize the acquired rights as the only ones to which our further examination is to be directed, there will remain to us only two objects for the possible exercise of will: unfree nature and extraneous persons.

(a) Donellus II. 8. S. 2. 3. admits a double *nostrum: in persona cujusque* and *in rebus externis.* In the first class he reckons four parts: *vita, incolumitas corporis, libertas, existimatio.* The *incolumitas animi* does not stand under the protection of law because it was not in need of it.

Puchta system des gem Civilrechts München 1832 puts as the first class of all rights those to a man's own person, and among them he reckons the right to personality and to possession. Under personality he includes jural capacity and reputation: but jural capacity is a condition of all rights, of property and of obligations, not less than of rights of the first class if one admits such a class *e. g.* of possession; it is therefore an element of all rights and can belong to no class in particular. That, which according to the general plan one might expect first of all, the right over one's own members, is entirely wanting and many another right besides is also wanting which must be there if between B. 3. and B. 5. Cap. 5. N. VI. a real connexion is to be visible. From this the arbitrary formation of the first class becomes clear; it seems to have been admitted almost for the sole purpose of furnishing possession with a convenient place. Hegel Naturrecht S. 70. und Zusatz

Unfree nature cannot be dominated by us as a whole but merely within limits determinate in point of place; a portion of it so bounded we call a THING, and hence to this is attached the first sort of possible rights, the RIGHT TO A THING which, in its purest and most complete shape, is called PROPERTY.

Those jural relations, of which extraneous persons are the objects, are not so simple, for we may stand to such in two wholly heterogeneous relations. The first possible relation to an extraneous person is that in which that person in like way with a thing, is drawn within the province of our will, therefore is subjected to our mastery. If this mastery were an absolute one, the idea of liberty and personality in that other would be entirely removed; we should not be ruling over a person but over a thing, our right would be property in a man just as the Roman relation of slaves in fact is. If this is not to be, if we desire rather to conceive a jural relation, which consists in mastery over an extraneous person without the destruction of his freedom, so that it is similar to property and yet different from it, the mastery must relate not to the extraneous person in his entirety but merely to an individual act of his; this act is then conceived as withdrawn from the freedom of the actor and subjected to our will. We call such a relation of mastery over an individual act of the extraneous person, OBLIGATION. This has a similar nature to property, not merely from an extended mastery over the outer world being embraced in both but it has still more special relations to property: first, through the possibility of estimating the obligation in money which is nothing

zu S. 70. expresses himself against this right to the own person and establishes by it the unavoidable admission of a right to commit suicide.

else than the transformation of it into property in money; secondly, through the most numerous and most important obligations being directed to no other end than the acquisition of property or the temporary enjoyment of it. By both sorts of rights therefore, property as well as obligations, the power of the person, possessed of the right, is extended outwards beyond the natural limits of its nature. The aggregate of the relations now, which in this way widen the power of the individual, we call his potentialities and the aggregate of the legal institutions relative thereto the law of potentialities (goods, wealth.)(b)

In the connexion of the person with an extraneous person, hitherto examined, each of them has been conceived as in himself a concluded whole, so that each in his abstract personality stood in presence of the other as a completely extraneous, though homogeneous, being. Wholly different in this respect is the second possible relation to the extraneous person which is now to be exhibited. Here we regard the individual man not as being subsisting for himself but as a member of the organic whole of mankind in the aggregate. Inasmuch now as his connexion with this great whole is continually brought about through the medium of individuals determined, his relation to those individuals is the foundation of a new, entirely peculiar sort

(b) The German expression for the legal concept stated is the most appropriate which could be found for it, since the essence of the thing is thereby directly expressed, the power accruing to us through the existence of those rights, that which we are in a condition to effect by means of them or potentialities (vermögen.) The Roman expression *bona* which has passed over into the modern languages of Roman origin and which primarily denotes a cognate concept namely, the well being produced by that power or the pleasure which it procures for us, is less suitable to the nature of the thing.

of jural relations. In this the individual appears to us, not as in obligations, an independent whole but as an incomplete being needing its complement in a large natural coherence. This incompleteness of the individual, like the completion referring to it, shows itself in two different directions. In the first place in the division of the sexes, of which each regarded by itself alone, comprehends human nature only incompletely; with this the completion of the individual by marriage is connected.(c) Secondly in the existence of single men limited in point of time, which limitation again leads in various ways to the necessity for, and the recognition of, completing jural relations. First of all and most immediately through the transient life of individual men; here the completion consists in propagation through the medium of which not only for the species but, in a more limited manner, for individuals, a constant continuance is produced. Then moreover through the constitution of human nature according to which the individual, at the beginning of his life, is entirely without the power over himself and only quite gradually attains to it; here the completing lies in the education. The institution of the Roman law in which this two-fold completing finds its common recognition and developement is the PATERNAL POWER; to this attaches itself, partly in wider developement, partly in purely natural or less juridical analogy, RELATIONSHIP.(d) Now for the summary of all these completing

(c) This view Fichte Sittenlehre expresses with some energy as follows. "It is the absolute destination of each individual of both sexes to get married .... The unmarried person is merely half a man."

(d) As wider unfolding viz. in AGNATION which is merely the residuum of an earlier existing paternal power with continued developement; as natural analogy, COGNATION in which the *jus gentium* recognizes the

relations—MARRIAGE, PATERNAL POWER, RELATIONSHIP—we call the FAMILY, and the institutions of law referring to it the LAW OF FAMILY.(e)

Since the family relation equally with the obligation is a relation to individuals determined, it seems very natural either to make these relations identical, that is, to reckon those of family under obligations or to set the two as nearly connected, in contrast with property which does not include in itself such a reference to individuals. This method of treatment is accordingly found among many, although often not in its full extension or not accompanied by clear consciousness. It is however to be thoroughly rejected, and it is of importance to the correct insight into the nature of the family that it should be given up as erroneous. Those

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association of individuals resting upon descent as the *jus civile* does in AGNATION.

(e) It must as to this be expressly remarked that this terminology is not taken from the Roman law. Among the Romans the expression *familia* has various meanings; the most important and most technical, is that in which it denotes the aggregate of the agnates, therefore a part only of the relation which I comprehend within it. If however the expression here selected is not founded upon the Roman law, still the summary of the relations denoted by it, as well as the ground of this summary, is completely conformable to the sense of the Roman jurists. It is in fact precisely what they denote by *jus naturale*. Ulpian says about it in L. 1. S. 3. de J. et J. "Jus naturale est quod natura omnia animalia docuit .... Hinc descendit maris atque foeminae conjunctio quam nos matrimonium appellamus: hinc liberorum procreatio, hinc educatio (Comp. App. 1.) That the ancient jurists, as we see in Gaius, on historical grounds allowed other points of view to come out more clearly in their treatment of the actual institutions of law, is not at all in contradiction with their recognition of that general natural connexion. The expressions selected by me are certainly in accordance with modern phraseology, just as my mode of summarizing is the only one suitable to our modern condition of law.

essential differences hence require to be stated in this place reserving the bringing to view still more definitely lower down (S. 54.), of the peculiar, completely distinctive, nature of the family. The obligation has for its object-matter a single act, the family relation the person as a whole in so far as he is a member in the organic coherence of collective humanity. The matter of obligations is of an arbitrary nature for at one time this, at another that, act may become the contents of an obligation; the matter of the family relations is determined by the organic nature of men, therefore bears in itself the character of necessity. The obligation is as a rule of a transitory nature, the family relation is destined for an enduring existence. Hence the individual family relations, where they appear in their completeness, take the shape of united associations which are precisely expressed by the collective name—family. In families are embraced the germs of the state and the completely formed state has families, not individuals immediately for its constituent parts.

According to this view obligation is in fact more nearly related to property, for the potentiality, which embraces these two relations, forms an extension of the individual power beyond its natural limits, while the family relation, on the other hand, is destined to the completion of its incomplete self. Hence family-law lies nearer than the law of potentialities to the so-called original rights, and as these have been above wholly excluded from the province of positive law, so it must be asserted of the family that it belongs only in part to the province of law, while the potentiality falls wholly and exclusively within it.

If we now look back to the point of departure of this examination of ours, we find three object-matters over which a mastery by our will is conceivable, and corresponding with those object-matters, three concentric circles, in which our will can rule.

1. The original self. The so-called original right answers to it; this we do not at all treat as law proper.

2. The self widened into the family. The government by our will, possible in this department, belongs only partially to the province of law and forms in it the law of family.

3. The outer world. The mastery by the will which is connected with this, falls wholly within the province of law, and forms the law of potentialities which again divides itself into the law of things and the law of obligations.

Hence there result three main classes of rights which from out of this stand-point of the research we have to admit:

1. Families'-right.
2. Things'-right.
3. Obligations'-right.(1)

(1) The German word is recht (jus) which means both right and law. These three terms may therefore be also properly rendered as Families'-law, Things'-law and Obligations'-law and in the following sections Savigny, as will be seen means by the compound the body of law belonging to the division. There is undoubtedly a dialetical advantage in a language distinguishing between the jus implying the right resident in a jural subject and the jus which as law gives form to the jural relation. The distinction however imposes a difficulty upon the translator in choosing between the terms where sometimes the one, sometimes the other will better express the meaning of the author. I will only add that Savigny uses the word form, with respect to the operation of law (jus) upon the matters of fact which with it compose the jural relation, not in the purely popular sense of opposition to substance, but in so popular a philosophical sense as to present no difficulty.—TRANS.

These classes of rights only subsist thus severed in our abstraction, in practice on the contrary they appear connected in a very manifold way, and in this constant contact, mutual influences and modifications must infallibly take place. Inasmuch as we have now to consider more narrowly the individual institutions of law of the three classes stated, regard must likewise be had to these modifications, as well as to the special developement which each institution has received in our positive law.

SECTION LIV.

FAMILIES'-LAW.

The nature of the family, which is now to be more closely examined, has been already stated above (S. 53.); its constituents were marriage, the paternal power and relationship. The matter of each of these relations is a natural relation which simply as such stretches beyond the limits of human nature *(jus naturale)*. Hence in accordance with their existence generally, a necessity independent of positive law must be ascribed to them although the special shape, in which they are recognized, is very manifold according to the positive law of different peoples.(a) This natural relation is however to men

(a) Thus *e. g.*, the existence of monogamy is an institution of positive law, while we ascribe to marriage, in whatever shape it may present itself, a universal necessity; nevertheless it must not be said that a choice between polygamy and monogamy happened to be determined by accidental circumstances; polygamy is rather to be regarded as a lower stage in the moral developement of nations. Sure enough even the necessity of marriage generally, not merely of monogamy, is contested *e. g.* by Hugo Naturrecht S. 210—214; and in fact the essence of it may be decomposed by the abstracting understanding, and by a free imagination any other condition whatever be conceived in its place

likewise of necessity a moral one and since last of all the form of law steps in, the family embraces three indissolubly united forms, the natural, moral and legal.(b) Hence it follows that the relations of family only partly carry in them a juridical nature (S. 53.); indeed we must add that the juridical side of its nature is plainly the smaller for the most important belongs to a province quite other than that of law.

Because however a natural element, as well as the legal and moral element is here ascribed to the family, this ought not to be understood as if the natural stood in the same line with these and must attain to an independent mastery. In the beast an impulse governs which serves the one general purpose of nature. This impulse and that natural purpose are found as completely in men as in beasts; in men however over this instinct stands the higher moral law which is to

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e. g. an irregular sexual love or propagation as a political institution. The healthy living feeling however of all nations as of all times and stages of culture would corroborate our assertion even if it had not found its highest verification in the Christian view of life. In like manner the artificial way in which they at times arise belongs to the positive developement of the institutions of families, *e. g.* the fatherly power by adoption. Further the inhibition of marriage between those very nearly related has its root in the moral feeling of all times but the extent of this prohibition is of an entirely positive nature. It must at the same time be added that the positive shape, in which these relations enter into a particular positive law, bears in this law the absolute character (S. 16.), since it is determined by the moral view of life of this special people.

(b) This three-fold nature of the relations of family is in its application to marriage very definitely expressed by Hegel Naturrecht S. 161. He says very finely of marriage "that it is the legally moral love" only the expression still requires to be completed thus "legally moral sexual love"—which besides is undoubtedly contained in the author's thought.

penetrate and dominate all parts of their nature consequently this instinct also; by this the natural is neither annihilated nor weakened in men but is elevated to the participation in the higher element of man's nature. In this matter Kant has erred in wishing to make the purely natural constituent in marriage, the sexual instinct, the object-matter of an obligatory jural relation; by this the nature of marriage is necessarily entirely misunderstood and degraded.(c)

If we now ask after the special contents of the jural relations belonging to the family, they seem to lie in the right which we have against the other person subjected to our will; only this subjection must be conceived not as a total but as a limited one merely affecting the relation of family;(d) and this opinion seems to find its support in the special determinations of the Roman law of family which is in great part based upon the firm mastery of the father of the family over the other members. However from the very stand-point of the Roman law this opinion is to be entirely rejected. Here the father sure enough has absolute mastery over the son, a mastery which, in the oldest time, is scarcely to be distinguished from genuine property. This mastery however does not constitute the true contents of the jural relation. It is the natural characteristic of the paternal power in which the father asserts himself by his proper power as in the mastery over his slaves, his house or his horse. There is nowhere any question of a juridical obligation of the son to obedience, as little of a complaint against the

(c) Comp. hereupon below S. 141. (d).

(d) So it is in fact conceived by Puchta, rhein. museum B. 3. S. 301—302.

disobedient son as against the disobedient slave. Only when extraneous persons infringe upon the mastery of the father of the family, actions are given against these. Still more manifest however is our assertion as to the free marriage. In this there is no question at all of rigid authority and obedience and still the Roman law knows nothing of legal claims of one of the married persons against the other, no actions for the protection of such individual rights, for the case of their denial. It is NOT therefore the partial subjecting of one person to another which forms the jural character of the family relations, therefore the peculiar contents of this class of jural relations. It is also only when one gives up this opinion, in itself so specious, that a sharp separation of family relations from obligations is possible, for the partisans of this view, how often soever they may guard themselves against it in words, inevitably transfer the nature of obligations into the family.

What however now remains to us as the true contents of jural relations appertaining to the family? We regarded them first as completions of the individuality in itself incomplete (S. 53). Hence their proper nature consists in the place which the individual obtains in these relations, in his being not merely man in general but specially husband, father, son, therefore in a LIFE-FORM firmly determined, independent of the individual will, grounded in a large natural coherence.(e)

(e) The family relations therefore belong especially to the *jus publicum i. e.* to the absolute law (S. 16.) Comp. above note (a). Hence also each family relation of a man is called especially a *status* of that man, that is to say, his place or his existence in relation to other men determined. Comp. S. 59. and App. VI.

It is therefore in no way denied here that to marriage, loyalty and self-sacrifice, as to the paternal power obedience and reverence, belong; but these in themselves, most important elements of that relation stand under the protection of morals not of law, just as the honorable and humane use, which the father of a family can make of his power over the family must also remain left to morals alone; it is merely by accident that the erroneous apprehension of this last case, as if it were a rule of law, is less possible. Hence we shall have a very uncertain knowledge of the condition of the family relations in a nation if we look merely at the rule of law prevailing in them without having regard to the morals which are its complement. Modern writers overlooking this connexion, have not seldom found groundless fault with the Roman law of family as with a heartless tyranny.(f) They have not

(f) Thus Hegel Naturrecht S. 175. "the relation of slaves of the Roman children is one of the most defiling institutions in this legislation and this mortification of morality in their inner-most and tenderest life, is one of the most important points for the understanding of the character of the Romans in the world's history and their tendency to legal formalism." In him the misunderstanding is the more incomprehensible, that in S. 161. he recognizes very well the necessity of a conjoint operation of the moral and legal elements in marriage, whence it naturally follows that in every people the marriage law presents merely an incomplete image of marriage. Wherefore then should not the same thing be true of the paternal power? Adam H. Müller Elemente der Staatskunst Th. 2. S. 59—65. pushes this error still further. He speaks of a "paternal and HUSBANDLY power as it is prescribed in our law-books according to the Roman pattern" and therefore regrets the want in the Roman (and our) family relations of all mutuality. According to him one might believe that we still concluded our marriages by means of confarreation while in very early times among the Romans the free marriage (without the smallest trace of power) was the most frequent and this alone has been transmitted to us with the Roman law. Further one might believe that the Roman laws would play but a melancholy part "if they are not to be supplemented or supported by an invisible

considered that the house-wives were as highly respected in no people of antiquity, as they were at Rome(*g*) and that a servile degrading treatment of the son was inconceivable in presence of a public law which allowed to him the enjoyment of all political rights and even the capacity for the highest Magistracies without prejudice to the paternal power.

This general characteristic of the law (right) of family will become more manifest through the statement of the real juristic contents of its single institutions. They consist in each of them of the conditions of its existence and recognition, to which belong the following separate parts: the presuppositions for the possibility of such a jural relation, the modes in which it arises and the grounds of its dissolution. Thus as to marriage, the paternal power, relationship. The jural contents become narrowed to these in so far as these jural relations in themselves are concerned. Still to each is added the important influence which that jural relation exercises beyond its own boundaries over others. This is now to be specially stated as to each of the three jural relations.

spirit of love or confidence" (S. 59.) As if any law in the world had made this spirit dispensable with or had brought it forth. What therefore this writer exhibits with scorn as a weakness of the Roman law is rather a regulation which it has pleased God to give to human nature in general.

(*g*) The beautiful description in Columella de re rust. Lib. 12. praef. S. 7. 8. of the family life of early times, comes in naturally here. "Erat enim summa reverentia cum concordia et diligentia mixta.." "Nihil conspiciebatur in domo dividuum, nihil quod aut maritus aut foemina proprium esse juris sui diceret, sed in commune conspirabatur ab utroque," and forsooth in the good old times which he pictures, the *in manum conventio*, therefore the rigid power of the husband, appeared more frequently than in later times in which it became continually rarer.

Marriage has the following operations upon other jural relations:

1. The arising of the paternal power over the children born of the marriage. This is again an independent jural relation in which absolutely no new determination of the reciprocal relations of the married persons is embraced.

2. Protection against violation of their moral dignity by the institutions of criminal law.

3. Manifold determinations in potentialities-law as: *dos, donatio propter nuptias* &c. The most numerous and important of these institutions are not immediate and necessary results of the marriage itself, but consequences of voluntary acts, of which the possibility is conditioned by the existence of the marriage.

The PATERNAL POWER reveals its influence upon potentiality in the following manner. The child is incapable of acquiring a potentiality for himself, therefore of possessing one; on the contrary there is a capacity of acquiring for the father, indeed this acquisition follows of necessity from the acts of the child. This as well possible as necessary representation of the father by means of the acquiring acts of the child is denoted as personal unity between the two. It is however narrowed in numerous ways through the in some measure falsely called peculium. If one compares this two-fold influence of the paternal power with the natural relations above stated as basis of the family, the result is as follows. The need of education (bringing up) finds its satisfaction certainly in the paternal power, not however in the properly legal side of it, but in the power legally undetermined which, without that, the father has over the child, even irrespectively of his

age. All the rest however, therefore the purely legal operation upon the potentiality above remarked upon, has no connexion whatever with education. In this operation the view is rather brought out unmistakeably, according to which the son takes upon himself the personality of the father and carries it on beyond that father's life in order then to transmit it to his own children, and procure for it in them a further continuance. This view is clearly shown in the representation of the father through the acquisitions of the child, as well as in the peculiar manner in which the SUUS obtains the paternal heritage. It is also shown in the INCAPACITY FOR POTENTIALITIES of the child, at the root of which doubtless lies the opinion that to the child potentiality of his own is unnecessary since that of his father is in fact at the same time his also.(*h*) Besides it is of itself obvious from this incapacity why it was not necessary specially to protect the potentiality of the child subject to the paternal power during the years of minority; this remark is moreover necessary here, since in it lies the point of departure from which tutelage, as an artificial succedaneum, proceeds.

Relationship lastly is the most indeterminate of those three relations, because it appears in gradations so different and at last is unobservedly lost. Indeed it is not commonly acknowledged as in the proper sense a family-relation, for one ordinarily places the charac-

(*h*) I say it is IN FACT his at the same time, because the child in a natural condition of family life participates in the benefits of the potentialities. Beside it subsists indeed the very slightly limited legal power in the father of denying to the child those advantages for the present and of depriving him of them for the future. The relation therefore is similar to that in the *dos* which in law belongs to the man, in fact to the woman; only there was as to the *dos* more occasion for developing this relation and expressing it in definite rules.

ter of such a relation in reciprocal jural claims, but relations as such have with few exceptions no rights against one another. This circumstance however cannot, according to our view above explained, prevent us from treating relationship as a family-relation proper; for the legal conditions of its existence are with respect to it accurately determined. This influence shows itself in the first place in marriage of which the possibility is excluded by certain sorts of relationship. Further in potentialities and here indeed in two ways. The most important influence is that upon the law of inheritance on account of which alone the most accurate fixation of this relation is rendered indispensable with. A second less important influence is shown in the obligation to alimony which however only appears in some sorts of relationship; in this consists the only mutual legal claim which is to be perceived among relations living at the same time.

According to the view here set forth each family relation, regarded as a natural-moral one, is entirely individual, for it consists of a reciprocal connexion between two single persons; as jural relation however, it is a relation of one person to all remaining men, inasmuch as by its very nature, it consists merely in the claim to universal recognition. Thus *e. g.* the only right of action which a father has in the first instance with respect to the paternal power, is a claim that the existence of this power be acknowledged by him who disputes it, and this claim proceeds neither more nor less against the son than against every third person. The jural relation once acknowledged may besides serve as the foundation of numerous other claims (to property, inheritance, &c.) The whole of this view finds a remarkable corroboration in the form of the

Roman action. The action is here a *praejudicium*, that is to say, an action which has as its result nowhere a *condemnatio* but merely a declaration as to the existence of a relation.(*i*) The name of this sort of complaints arises from their serving to prepare the way for other future actions. Lastly all these actions are *in rem*, that is, they are not exclusively available, as those founded upon obligations are, against a determinate person bound by the duty.(*k*)

SECTION LV.

FAMILY-LAW.—*(Continuation.)*

Hitherto the family has been examined in its natural compass. Other institutions, which then display an artificial extension of the family-law, may however be formed after the type of these natural institutions of family. From the natural, such artificial family-relations are distinguished by the circumstance that unlike those, they do not rest upon a natural-moral foundation whence also their existence is not grounded in a universal necessity. According therefore to Roman technical phraseology, they do not belong to the *jus naturale*.

The Roman law knows the following institutions of this artificially extended family-law.

1. *Manus*.—This rests upon an artificial blending of the two main branches of the natural family, marriage with the paternal power. The wife hence becomes put in the legal relation of a daughter of the husband, in which consequently an external addition to the

(*i*) Gaius IV. S. 44. 94. Comp. L. 1. S. 16. L. 3. 4. de agnosc. (25. 3.) L. 1. S. 4. de lib. exhibendis (43. 30.)

(*k*) S. 13. J. de act. (4. 6.)

marriage and, mainly in reference to potentiality, a modification of it are embraced. Certainly however this view of the *manus* holds good only of a somewhat late period of the Roman law, in which it was left a voluntary matter whether this special addition should be made to the marriage. In the oldest time it was the only possible form of marriage in general.

2. *Servitus.* The relation of a slave to his master had among the Romans two wholly different jural relations, *dominium* and *potestas*, which were however constantly united in practical life. According to the first it was pure actual property; the slave stood in this exactly like every other thing, he might be alienated not merely as complete property, but also when a usufructus, a *usus* or a right to have him in pledge was established upon him. Lastly the same actions were available against every infringer of this right as against him who injured any other property, especially therefore the Vindication. According to the other relation he was a constituent part of the family, in imitation of the paternal power and strongly resembling it. The putting of these together is justified, by the property which originally the father had also over the children, by the common name *potestas*, and lastly by the fact of the slaves standing in the same situation as the children in the incapacity for the potentiality, in the possible and necessary representation of the master through the acquiring acts of the slaves, and in the *peculium*. If our sensibility is hurt by this similarity of position between children and slaves, we ought not to forget that, in the very ancient time in which this institution was established, the slave was the ploughman of the master, therefore the assistant in his labour and most probably also his companion at

table. In the completely changed mode of life of the later age, when the slaves became objects of luxury and of commercial speculation to the most exaggerated extent, that similarity of position had in truth lost all sense and all appropriateness. It is however one of the most important sources of weakness in the condition of the Romans, that they did not early enough and thoroughly enough bethink themselves of modifying the relation of the slaves and the freed-men in accordance with the completely altered necessities. To this second relation lastly belongs also manumission, that is to say, the capacity of the master to impart freedom and as a rule citizenship also to the slaves; lastly also the *liberale judicium*, or the *vindicatio in servitutem* and *in libertatem* which afforded to the potestas the same protection as the ordinary *vindicatio* to the *dominium*. Still somewhat different from all this, is the case of jural capacity being almost entirely wanting to slaves; for this also may be found among those over whom *dominium* and *potestas* by accident do not exist, among the *servi sine domino*. Then although the whole jural institution of slavery had been merely introduced and developed for the sake of the power of the masters, still they had formed out of it the general idea of the CONDITION OF SLAVES, as an independent condition, which should be capable of existence and practical effect even in the cases of the slaves accidentally masterless.(a)

(a) To this class belong the following cases. 1. The servus poenae, who was in no way in the property of the state. L. 17. pr. de poenis (48. 19.) L. 3. pr. de his 9. pro non scr. (34. 8.) L. 12. de j. fisci. (49. 14.) L. 25. S. 3. de adq. hered. (29. 2.) 2. The Romans who became captives to the enemy, for the enemy was rightless, could consequently have no *potestas* and no *dominium*. 3. The freed man over whom,

3. *Patronatus.*—Emancipation makes the slave into a free man and imparts to him according to circumstances, now a lower now a higher position among free men. However there exists in presence of that freedom a personal relation between the patron and the freed man which itself also again partakes of the nature of a family-relation, just as the relation of slave, from which it sprang by means of the change, had this nature. *Patronatus* had considerable influence upon the potentiality-law, for in that law it connected itself in many ways partly with succession partly with obligations. To it belong institutions of criminal law which are destined for the protection of the high position of the patron as against the emancipated.

4. *Mancipii causa.*—Since the mastery of the father over the children was in the oldest time in fact scarcely distinguishable from property, he could also alienate them, and the same held good of the husband who had his wife, like a daughter, *in manu;* but these free persons when alienated were to stand to the new masters in another and milder relation than actual

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before the manumission, another had obtained the usufruct. Ulpian I. S. 19. (L. 1. C. comm. de manumiss. 7. 15.) 4. The slave who was a derelict by his own master. L. 38. S. 1. de nox. act. (9. 4.) L. 36. de stip. serv. (45. 3.) L. 8. pro derelicto (41. 7.) It was something wholly special and purely positive that according to an edict of Claudius the cruel abandonment of a sick slave was to give him the Latin right. L. 2. qui sine manum. (40. 8.) L. un S. 3. C. de lat. libert. (7. 6.) The rule remained side by side with it unaltered. The condition of the *servus poenae* was harder than that of the *servus fisci:* hence the condemned became by means of favour a *servus fisci* and the child of the woman sentenced to the mines had also the condition of *servus fisci.* L. 24. S. 5. 6. de fideic. lib. (40. 5.) On the other hand slaves without masters could never become libertini; if therefore they became free, the condemned by pardon, the prisoner by postliminium, they became again *ingenui.* Paulus IV. 8. S. 24.

slaves. This was the *mancipii causa*, a mediate condition between free men and slaves out of which further a *patronatus*, similar to that over real slaves, might arise through emancipation. Only in the incapacity for the potentiality and in the acquisition for the masters, this dependence is exactly similar to that of slaves. These jural relations maintained themselves in extensive use, as pure legal forms for the dissolution of the paternal power, long after a sale of children in real earnest had gone out of use, and more, had in fact become punishable.

5. *Tutela* and *curatio*.—The germ of this institution of law is indisputably guardianship over minors, and this must be regarded as a substitute for the paternal power where such is by accident wanting. The only question is in what sense it is such a substitute. Certainly not so far as in the paternal power lies a personal unity, for this certainly is not present in guardianship. One might think rather of the relation of education, but this also lies without the limits of guardianship and can only be, as a mere accident, bound up with it. The true connexion however is this. When the possessor of a potentiality is under age, he cannot deal with his potentiality, that is to say, he is incapable of acting. Now most minors are under the paternal power and as to them that difficulty does not exist, since all which devolves upon them is lost in the potentiality of the father; they themselves therefore can have no potentiality (S. 54). In other words, their incapacity to act becomes harmless through their jural incapacity. It is otherwise when the minor by accident is without father, consequently can himself have potentialities. In this case an incongruity arises between

the jural capacity present and the capacity for action wanting which requires an artificial, positive, remedy. Upon this alone guardianship is originally based, for in this case alone a general, important, frequent, natural necessity is present. The remaining cases of tutelage, as well as the whole of curatorship, rest upon progressive developements of a similar necessity. They have this however in common with that principal case that they only appear where the strictly legal relation of a *potestas* or manus, does not already render them superfluous. The jural contents of these relations are two-fold. First they supply the incapacity for action wanting to the jurally capable. Secondly they at a later period change themselves into obligations between him who was Tutor or Curator and the person entrusted to his care.

In the time of the classical jurists, the artificial extension of the law of family was confined to the five institutions here explained. In Justinian's time the addition of a sixth COLONATUS is necessary; at that time it had long been as extended as it was important. The essence of it consisted in a hereditary, indissoluble obligation to the cultivation of a particular farm (copyhold); it was cognate to the *servitus* and still essentially different from it.(*b*) That this relation is not mentioned in the first book of our institutes is not to be explained on reasons inherent in the matter but by the small independence of intellectual activity in the age of Justinian. They satisfied themselves by somewhat modifying the books of the classical age instead of independently setting forth the living law of

(*b*) Savigny über den Römischen Colonat., zeitschrift für geschichtl. Rechtsu. B. 6. Num. 4.

the present; for this reason they remained with few exceptions relegated to the circle of objects of those books.

The artificial family relations have moreover in the most important connexions a similar quality with the natural (S. 54.); they are like these, legal relations against every one who contests their recognition and they are also protected by *praejudicia.*(c)

I have made use of the appellation, natural and artificial family relations, in order thereby sharply to distinguish those parts of the law of family which are *juris naturalis* from those which are not so. For the prevention of misunderstanding it is however to be remarked that the Romans ascribed to the institutions, indicated by me as artificial, a very diverse nature. As to the *manus* and the *mancipii causa* it could not be mistaken that they were entirely peculiar to the Roman law, therefore belonged to the *jus civile;* they may have had the same opinion of *patronatus* also. On the other hand they counted guardianship, so far as relates to minors in the *jus gentium;*(d) in the same way with slavery which appeared among other nations as much as among the Romans.(e) In relation to this last the developement of the view of law, which has entered in the train of Christianity, is very remarkable. No philosopher of antiquity holds the existence of a state without slaves possible. In all Christian European states, on the other hand, slavery is regarded as impossible; and in the Christian states out of Europe,

(c) S. 13. J. de act. (4. 6.)

(d) Gaius. I. S. 189.

(e) L. 1. S. 1 de his qui sui (1. 6.) S. 1. J. eod. (1. 8.)

the struggle for the continuance or annihilation of it, is one of the most important problems reserved for the future.

Two other doctrines of law however stand in close connexion with the relations of family just explained: representation in the acquisition of the potentiality and legal capacity in different degrees.

Representation in the acquirement of a potentiality (S. 113.) is bound up with *potestas*, *manus*, mancipium, therefore with three or properly four of the family-relations above set forth. All family-relations however have not this important influence; it is not found namely in the marriage as such, the *patronatus* and guardianship. The law of family therefore goes very much beyond this doctrine and ought not to be held as identical with it.

Legal capacity (which will be explained at length in S. 64. fg.) rests upon a three-fold classification of men, with which are connected three degrees of the *capitis deminutio*. The distinctions of the *liberi* and *servi*, of the *sui juris* and *alieni juris*, are completely based on some of the above stated family relations; on the other hand the third distinction *(cives, latini, peregrini)* lies wholly without the limits of the law of family, indeed of the private law in general; on the contrary however several family relations—marriage as such, relationship, patronatus, guardianship, have no influence at all upon jural (legal) capacity. The theory of jural capacity also therefore is not thoroughly identifiable with the law of family; the two have rather limits entirely different.

The historical developement of the institutions appertaining to the family-law are still in the last place

to be mentioned. The *manus* and the *mancipii causa* had already entirely vanished in Justinian's time. On the transition of the Roman law into modern Europe slavery and the *patronatus* have also vanished. In like manner the Roman *colonatus* could not obtain lasting recognition in modern Europe since the very similar Germanic bondage *(serfdom)* had completely taken its place. It was also entirely dislodged by this in Italy and France; in the larger part of Germany however it had not been received with the Roman law. Accordingly of all those institutions, the following only have remained in the modern law: marriage, paternal power, relationship, guardianship.

On the other hand from the middle ages on the German law as their foundation have newly arisen several institutions of law, in which, as in the family-relations previously existing among the Romans, a moral element must be recognized as especially influential, and which, if their nature is to be rightly conceived, must be partially ranged in the family-law, at least partially in the public law. Of this nature are the whole feodal relation, the very numerous relations of the lord of the manor to the peasants and in particular the already mentioned Germanic serfdom. We must also avoid attempting to fix rigidly the limits of the family-law for all times and nations and must rather recognize the possibility, for each positive law of a free developement. This progressive developement shows itself in a specially remarkable way in one of the most extended relations of our modern condition, the law of hired servitude. From the stand-point of the Roman law, this admits of being conceived merely as a contract *(operae locatae)* and this contracted treatment was

sufficient for the Romans, since by reason of the excessive number of the class of slaves the need of free domestic servants was almost wholly imperceptible. It is otherwise with us who have no slaves; whence that relation has become of very important and extended necessity. Now we are not satisfied with the narrow treatment of it like any other contract for labour and thus in the Prussian land-recht, the law of hired service has been perfectly correctly received not under contracts but into the law of persons.(f)

SECTION LVI.

POTENTIALITY'S-LAW.

Two object-matters, things and acts (transactions), have been stated above (S. 53.) for the law of potentialities. Upon them are based its two main divisions THINGS'-LAW and OBLIGATIONS'-LAW. The first has for its matter possession or the mastery over things in point of fact. As law it appears simply and completely in the shape of PROPERTY or the unlimited and exclusive mastery of a person over a thing. In order however to make clear to us the nature of property we must set out by the following general examination. Every man has a calling to the mastery over unfree nature; he must however equally recognize the same calling in every other man and from this mutual recognition, in the contact of individuals in space, arises the necessity of the equalization which appears first of all as a something indefinite and can only be satisfied by a more determinate limitation. This satisfaction now, by the help of the communion in the state, is obtained

(f) A. L. R. II. 5.

through positive law. When we here ascribe to the state a common jurisdiction over the unfree nature within its boundaries, individuals appear as sharers in this common power and our task consists in finding a definite rule according to which the distribution among the individuals is to be carried out. That distribution may be made in three ways which must not however be conceived in a relation of excluding one another but they may rather in a certain degree be in simultaneous application. We may denote these three ways in the following manner:

1. *Common property and common enjoyment.*—This relation is found in the whole state's-potentiality, whether this consists of the revenue from taxes, regalia or demesnes, for the public institutions maintained by this revenue are in fact made use of and enjoyed by each individual though often in different degrees.

2. *Common property and private enjoyment.*—This the rarest sort of distribution is found in the Roman *ager publicus* of the most ancient time; in like manner in modern corporations in which we call them citizens' potentialities.

3. *Private property and private enjoyment dependent upon the free acts or natural events recognized in positive law.*—This everywhere prevailing form is the single one with which we have to do in private law. Herein lies the idea of property, the complete recognition of which leads to the possibility of wealth and poverty, both of them without any limitation.

A mastery of individual men over unfree nature lying without the bounds of property is not conceivable; at the same time however within the limits of property

a mastery, limited in manifold ways, is conceivable from which in fact, according to the determinations of each system of positive law, numerous individual *jura in re* may be formed. All possible rights to things—property and *jura in re*—we embrace under the common name of REAL RIGHTS.(a)

The matter of the law of obligations is the partial mastery over the acts of others by which that, which conceiving it in its entirety we describe as commerce, is conditioned and formed. All acts however are not adapted for object-matters of obligations but those only which through their material nature may be regarded as stepping out from the person and similar to things.

If we sum this up, a pervading contrast to family-law here shows itself. In the two parts of potentiality's-law, the matter does not, as in the family, consist in a natural-moral relation; those parts have therefore no mixed nature but are rather pure mere legal relations; they belong not to the *jus naturale* and the recognition of their existence appears less necessary, more arbitrary and positive, than in the institutions of family-law. On the other hand the doubt cannot here arise, in what their real legal contents consist; for since a widening of the individual freedom is to be embraced in them (S. 53.), this very power, this mastery which they procure for us, is that which furnishes them, as institutions of law, with their contents.

To the assertion here made that the potentiality's-law does not, like family-law, include in it a moral

(a) This terminology is only generally stated here for the prevention of misunderstanding. The more accurate determination of it as well as the specification of the individual *jura in re* is reserved for the special law of things.

element, it might be objected that the moral law is to rule over every kind of human action and that therefore the relations of potentialities also must have a moral foundation. Of course they have such inasmuch as the rich man ought to regard his wealth as goods entrusted to his management; only this view remains completely foreign to the dispositions of law. The distinction lies therefore in the family-relation being only incompletely governed by the institutions of law so that a large part of it is abandoned exclusively to moral influences. On the contrary in the potentiality's-relations the mastery of legal institutions is completely accomplished and that without reference to the moral or immoral exercise of a right. Hence the rich man can allow the poor one to perish either through the denial of assistance or the harsh exercise of the right of a creditor and the remedy admitted against this, springs not from the ground of private, but from that of the public law; it consists in the institutions for the relief of the poor to which of course the rich man can be compelled to contribute although perhaps his contribution is not immediately perceptible. It remains therefore true, in spite of this, that no moral constituent is ascribable to potentiality's-law, as an institution of private law, and through this assertion neither the absolute domination of the moral law is mistaken, nor the nature of the private law placed in a doubtful light (Comp. S. 52).

At the first glance the relation to one another of the two divisions of potentiality's-law stated, seems so immutably determined by their bare object-matter, that it must everywhere be found to be the same. On closer examination however a very free play-room for manifold determinations of the positive law of different

nations is shown in this law; and indeed we find this variety, partly in the determination of the boundaries between things'-law and obligations, partly in the connexion in which these two parts of the law may be conceived to one another. So far as the settlement of boundaries is concerned, certain extreme points doubtless present themselves in which the special nature of one or the other division is wholly unmistakeable: thus rigid property with unlimited vindication on the one side, the contract of hired service and mandate on the other, but between these lies a natural approximating, indeed a gradual transition, in the fact that the most numerous and important obligations aim at acquiring by the acts of others a right over a thing or at least the use and enjoyment of such.(b) In this connexion now the Roman law is characterized by a sharp standing out of property, which shows itself, partly in the unlimited operation of the vindication,(c) partly in the very limited possibility of an attenuation of property by means of *jura in re.*(d) All now is dependent upon whether the thing in itself, independ-

(b) Namely all *dandi obligationes.* On that is based the phraseology of many modern jurists according to which obligations (jura personalia are divided into *jura pers. in specie* and *jura ad rem.* Daries Inst. juris pr. priv. S. 31. In like manner the Prussian A. L. R. Th. 1. Tit. 2. S. 123. 124. supposes as genus the personal right, as species the right to the thing.

(c) In contrast to the Prussian, the French law, as a rule, allows of no vindication of moveables but only exceptionally in particular sorts of loss of possession. In like manner the Prussian law gives to the bonâ fide purchaser of things of every kind the right of obtaining restitution of the selling price from the proprietor.

(d) The Roman law admits *jura in re* as possible only in individual cases determined. The Prussian law, on the other hand, explains every right of enjoyment of the things of another as real so soon as possession steps in without distinction of the occasion and aim of it.

ently of an act of others, is the object-matter of our right or whether our right is immediately directed to an act of others as the object-matter subjected to our mastery and without regard to whether this act has for its end to invest us with the right to a thing or to the enjoyment of it. The existence of an *in rem* or *in personam actio*(e) serves as a safe indicator of this limit; the distinction between the two indeed for the most part, by no means however universally, coincides with the difference between an opponent undetermined and determined.(f) The connexion of both divisions of potentialities to one another may easily be darkened by those vanishing boundaries. The Roman law holds them firmly apart from one another and treats each division by itself as quite independent within its limits. Thus property as the independent mastery over a thing without regard to the obligation which

(e) It ought not to be said that the limits of these two sorts of action mainly coincide with the limits of things'-law and obligations'-law, for very important *in rem actiones* exist, which do not belong to the law of things; but indeed all actions arising out of real rights are *in rem*, all arising out of obligations *in personam*. The more precise determination of this point belongs to a later section.

(f) It is often said—the essence of the *in rem* actio as opposed to that *in personam* consists in *that* proceeding against every third person, every possessor, and *this* not so proceeding; but the *actio quod metus causa* proceeds as *in rem scripta* against each third person and is on that account none the less *in personam*. Meanwhile such cases are merely rare exceptions and when we conceive the object-matter as a whole, we are fairly justified in saying—rights to things (real) are directly distinguished from obligations by their general operation against all, not merely against individuals determined. A consequence of this in the main correct distinction is then this also—that the real rights, since they are to operate against a person undetermined, therefore in the greatest extension, have also a more firmly determined nature than obligations, that is to say, they embrace more absolute law or jus publicum (S. 16.)

perhaps served as mediation and preparation for it: the obligation as independent mastery over an act of another without regard to the real right, which is perhaps the aim of this act. A two-fold aberration is possible from this treatment completely conformable to the nature of those rights: inasmuch as obligations alone may be kept in view and real rights appear merely as consequences or developements of them (g) or on the other hand inasmuch as real rights may appear as the sole object-matter of the legal determinations for then obligations are merely regarded as modes of acquisition of real rights.(h) Each of these modes of treatment is, from the very fact of being constrained and one-sided, an obstacle to an insight into the true nature of the jural relations, to say nothing of the fact that these modes are wholly unadaptable to many jural relations, so that properly speaking, in the consistent carrying out of the fundamental thought, these must be wholly omitted.(i)

(g) Thus it happens with Domat lois civiles. He divides the whole law into *engagemens* (rights among the living) and successions (law of inheritance.) The Engagemens are obligations beside which real rights appear merely incidentally as consequences or corroborations.

(h) So in the French civil code, which has three books. 1. Persons. 2. Things and modifications of property. 3. Modes of acquisition of property; these are three-fold: (a) Successions, *i. e.* heirship to an intestate. (b) Donatio inter vivos and Testament. (c) Operation of obligations. (Art. 711.) This preponderance of property is however merely apparent, for the second book is very meagre, the third on the contrary embraces the greatest part of the whole private-law whence the predominant reference to property figures in the title only. Thus the Prussian Land-recht treats obligatory contracts and testaments merely as titles to the acquisition of property (Th. I. Tit. 11. 12. 13.)

(i) Thus *e. g.* as a consequence in Domat no place is found for occupation and the so-called specification. The Preuss. Landrecht and the Code civil treat the mandate as a means for the acquisition of property, although according to its general nature, it can just as well be directed to other objects.

By potentiality in its application to an individual we now understand the totality of all the relations here described, in so far as they connect themselves with a person determined as their subject. This important jural concept will be more fully brought out by the following closer definitions. In the first place, the attachment of these rights to a person determined is casual and changeable so that that potentiality has a determinate compass only under the presupposition of a given point of time and that in every other point of time it may have contents wholly different. Secondly we can, in the general treatment of the individual potentiality, abstract from it the quality of the individual rights of which it consists and by means of this abstraction it is changed for our treatment into a pure quantity of homogeneous contents. The abstract handling of the potentiality makes it moreover possible and necessary to draw into it the passive side of obligations, the relation of the debtor which is not like the potentiality, hitherto treated, the foundation of an extended, but of a diminished freedom. When we in this way regard the debts also as constituents of the potentiality, we must admit that the totality of every single potentiality may exhibit sometimes a plus, sometimes a minus, sometimes a complete indifference or a cipher.

This purely quantitative treatment of the potentiality, without which an exercise of the right would only be possible in a very incomplete way is brought about by means of the idea of VALUE or the equalization of heterogeneous rights of potentiality by reduction to a common third. This idea again is externally manifested and introduced into practical life by MONEY so that in their legal acceptation, value and money-value are

synonymous and are in fact also habitually interchanged in the employment of them.(k) The individual potential is thereby so far converted into a pure quantity that all its constituent parts are resolved into the ownership of a sum of money: thus it is with, the property in every other thing—all *jura in re*—the bare use of a thing naturally with special regard to its duration—lastly with obligations also, consequently credits and debts, be they or be they not directed to the creation of rights over things or their mere enjoyment *(dare facere.)* Hence it becomes possible to reduce the pure *faciendi obligatio* also to genuine property,(l) so that the individual potentiality is now conceivable as property in a sum of money, as a money debt which there are no means of paying, or as a complete nullity. At the same time however the remark made at the beginning of this section, that all acts are not adapted for the object-matters of obligations, receives a more determinate meaning; those acts, namely, of which the conversion into a sum of money would be wholly

(k) In the older Roman procedure this practical reduction of all rights, even the most heterogeneous, to a money value came out very visibly. Gaius IV. S. 48. Hegel Naturrecht S. 63. defines in the main correctly the ideas of value and money and is only one-sided in recognizing merely a property or purchase value; he therefore neither recognizes a value in use nor the value of a thing on the hypothesis of the property in it being inalienable; certainly still less a value of acts, in particular of labour which he does not even mention in that passage. However through this unnecessary limitation that idea loses the greater part of its usefulness.

(l) What practical consequences are attached to this bare possibility remains for the present wholly undetermined. Whether such a commutation is always in the option of the debtor, or whether it is to operate as merely a succedaneum where the original object-matter of the obligation is no longer possible, can for the first time be investigated in obligations'-law.

inconceivable, are not suitable for that purpose; at least these can be regarded only as, improperly and in an incomplete manner, obligations.

In the idea of the individual potentiality, the unity which we ascribe to it, is based upon the person of the possessor. For definite purposes however this once independently formed concept admits of being transferred to some other artificially supposed limits, whereby the unity then becomes one arbitrarily assumed. This happens with the *peculium* and the *dos* which are of course for certain purposes regarded as an arbitrarily limited potentiality.(m) Each case of this sort is often denominated a UNIVERSITAS JURIS. The name *universitas* is unquestionably suitable to it, for this denotes each single whole conceived in contrast to its constituent parts.(n) The combination of the two does not occur in Roman phraseology; but it is more important and censurable that people have allowed themselves to be misled, by this newly discovered technical expression, into ascribing to those cases a common nature and applying to them certain arbitrarily conceived rules of law. Each of these cases however has rather its wholly peculiar nature and for each of them, this nature and the rule of law prevailing for it require to be established.(o)

(m) A still more important case, the inheritance, is added to these two; the following section is the place for speaking of it.

(n) This appellation is applied without distinction whether it is a whole of persons (*e. g.* a corporation), or of things (herd, library), or of rights (Peculium, Dos.); moreover to the universitas of things without distinction of whether the parts are united in one body (house in contradistinction to the beams and stones) or not (a herd): without distinction whether the union into a body is produced by nature (animal and plant in contradistinction to the individual parts) or by the will of man (house).

(o) This matter is treated in a thorough and convincing way by Hasse upon universitas juris and rerum Archiv. B. 5. N. 1.

SECTION LVII.

POTENTIALITY'S-LAW.—*(Continuation.)*

It has been remarked above (S. 53.) that in actual life the relations of the family and the potentiality come into manifold contact with one another and that this contact generates in each of these two classes peculiar developements. Thus in family-law slavery readily took its rise from the reception of an ordinary case of property into the family fellowship: the potestas was also a consequence of the dominium and shared all its incidents as is shown for instance in the possibility of absolutely alienating slaves and transmitting them as heritage. *Patronatus* and *mancipium* had again formed themselves out of slavery: guardianship had its aim and its significance merely in the potentiality. Colonatus is entirely connected with an obligatory relation which makes up its contents and of which it shares the incidents *e. g.* in the transition to the heirs of the master.

Similar reactions of the family upon the potentiality are also found. The first and most immediate consists in special institutions of potentiality being established for the individual family-relations, namely real rights and obligations which in their present shape and with their present details are possible only on the presupposition of defined family-relations. We call the aggregate of these APPLIED FAMILY-LAW and this is precisely what especially gives to the family its proper juristic character (S. 54).

The potentiality's-law also however is susceptible and in want, within its own boundaries, of that wider developement which we denote by the name of the

law (right) of inheritance. The meaning of this must now be explained.

We originally regarded the potentiality as an extending of the power of the individual man, consequently as an attribute of his in his exclusive personality. Since this now is of a transitory nature, the potentiality of each man must, with his death lose its legal significance, that is, be reduced to nothing; but all right generally first receives its reality and completeness in the state, as positive-law of this state, and thus even property could only attain to a practical existence by its being referred to the state and through the medium of the rules developed in the positive law of the state to the individual participators in the right in the state as proprietors (S. 56). If we apply this mode of conceiving the matter to the case mentioned, while by the death of its possessor a potentiality ceases to subsist as an attribute of his so now it no longer falls back into nothing inasmuch as its connexion with that more remote foundation, by reason of the imperishable nature of the state, continually lasts on. As now different possible ways have been above explained for the legal developement of the mastery of men over un-free nature, so also can such a potentiality, which has become masterless by death, be treated differently in order that it may continue preserved uninterruptedly as a constituent in the aggregated legal organism.

The first possible mode of treatment for this end consists in the potentiality continuing a private one through the deceased, by a sort of fiction, being regarded as continuing to act beyond the period of his own death. This again may happen in a two-fold manner; partly through the fate of the potentiality being still

determined by the will of the possessor expressed during life (testaments and contracts touching the inheritance); partly through a continuation of the ownership over the potentiality by those who were in any way whatever akin to the deceased during his life (succession to an intestate): thus then the idea of the continuance of the individuality (S. 53.) established by means of consanguinity is of peculiar influence.

According to a second possible treatment that which was hitherto private potentiality, at the death of the possessor becomes converted into state's-potentiality. This is not seldom found among the states of the East; but in Christian Europe also this mode of treatment presents itself, although in a far more limited way wherever namely succession duties are introduced of which the proper nature consists in a division of the heritage between the state and other heirs.

The first solution of the problem is the only one with which we have to do, not only because it is recognized in the Roman law but also because it alone belongs to private law with which we are exclusively concerned. As to it above all things arises the important question in what legal form that transition of the vacated potentiality, to a new private possessor, is to be carried out. The differences, which are perceived in this respect, are in no way dependent upon different principles between which a selection was to be made but rather upon the more or less thorough comprehension and solution of the problem itself. It would be conceivable that a system of legislation should have limited itself to determinations by which the single parts of the potentiality, so far as they were of any value, should be actually put into the possession

of the persons to whom the vacated potentiality is to accrue; by this means provision would necessarily be made for the immediate practical end. If however one has regard to the proper nature and need of the jural relation here presented to us, the potentiality must be treated as a unity of which the basis is to be found in the common reference to the deceased holder; this treatment moreover of necessity leads further to the consistent carrying out of the view of the potentiality as a pure quantity, the diverse qualities of its single constituent parts being removed by abstraction (S. 56). In technical phraseology this is thus expressed—all succession is to be treated as a SUCCESSIO PER UNIVERSITATEM, beside which, merely in a subordinate way and as a limiting exception, a special succession to single parts of the potentiality may occur.(a) It is one of the most remarkable phenomena in the history of the Roman law that this view was recognized in it in a manner so clear and definite, and that simply by means of genuine practical tact, long before a scientific developement of this institution of law could have been thought of.(b)

From this results a two-fold view of the whole law of inheritance of which each is alike true and important. That law, in the first place, appears as a mode of acquiring all the individual rights belonging to the

(a) I merely use these expressions provisionally; the more accurate establishment of them, as of succession in general, will appear in a subsequent paragraph.

(b) I am far indeed from asserting that the Romans had already in early times conceived and determined this relation in an abstract way. There exists however a purely practical occasion for entering upon this question whereby it must be shown whether it has been understood in its right sense or not: the credits and debts in the inheritance are such

potentiality—as ADQUISITIO PER UNIVERSITATEM.(c) Secondly the object-matter of succession appears as a peculiar, independently subsisting right, as a *universitas*(d) and to this is referable in particular the special sort of pursuit of the right (action) which appears in company with it. Both modes of conceiving it unite in the view according to which the heirs with the deceased make up a single person, therefore continue him or represent him. According to this view therefore the original relation is completely inverted; for while originally the man was of necessity conceived as substance, the potentiality as accident because it merely modifies the freedom of men by widening it, so now, as the enduring and essential appears the potentiality to which the individual possessors stand merely in the relation of transitory changing owners.

In this place the potentiality has been constantly treated as the object-matter of the law of inheritance;

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an occasion. What the twelve tables had determined upon that matter was so thorough and satisfactory, that legal science at the period of its highest developement met in those determinations, with nothing to improve. The whole *successio per universitatem* was therefore at that time already conceived with complete definiteness. Comp. L. 6. C. fam herc. (3. 66). L. 25. S. 9. 13. eod. (10. 2.) L. 7. C. de her act (4. 16.) L. 26. C. de practis (2. 3.)

(c) In Gaius and thence in Justinian's institutes also, the whole law of inheritance is merely from this point of view inserted into the system of the institutions of law. The one-sidedness of this mode of conceiving it is shown among other grounds by the fact that it is expounded as a ground of acquisition of property, while in this view it belongs neither more nor less to property than to obligations.

(d) Hence the heritage is named by the moderns a *universitas juris*; to this illegitimate expression numerous not unimportant errors concerning the matter have attached themselves.

in this is involved the assumption that the family-relations do not belong to its object-matters. Property and obligations therefore are transmitted; marriage, paternal power, and relationship are not; but those artificial institutions of the family law, which are completely annexed to a right belonging to the potentiality, must also share its incidents (S. 55). Thus slaves, like every other piece of property, are transmitted: in the same way the *coloni* with the demesne lands with which they are inextricably bound up.

In the establishment of the law of inheritance lies the completion of the law-organism, which is thereby extended beyond the limits of the life of the individual. If we compare the law of inheritance with that which we have earlier learned to know as potentiality's-law, that appears not subordinate to, but co-ordinate with this. From out of the higher stand-point now gained we must admit in the aggregate potentiality's-law two main divisions: the contemporaneous and the successive potentiality's-law. The first embraces the conditions under which each individual can for any given point of time whatever, found for himself a potentiality (Things'-law and Obligations'-law.) In truth into these also a change may enter through modifications in time but that change is accidental and foreign to the nature of the potentiality. In the second, on the contrary, this changing appears as of necessity produced by the end of life predestinated to each individual, indeed this changing is the basis and forms the special contents of the whole jural relation.

SECTION LVIII.

REVIEW OF THE INSTITUTIONS OF LAW.

The arrangement of the legal institutions here attempted is based upon their innermost nature, namely upon their organic connexion with the actual nature of men in which they are inherent. All their other attributes must on the other hand appear comparatively subordinate and not adapted for the foundation of the system of law as a whole. To these secondary attributes the following relations belong. First the OBJECT of the jural relations or that which, by means of them, is subjected to our will.(a) This relation has reality only under a pre-supposition of the mastery as fundamental character of the jural relations; by this one is certainly first of all led to ask what is to be dominated by us. This relation is therefore adapted for a subordinate division of the potentiality's-law (S. 56.), not however for a principal division of the matter of law generally since it is not suitable to family (S. 54). Secondly to those secondary attributes belongs the quality of the person standing opposite to the person entitled, namely according as our right is directed against all men in general or merely against an individual determined. From this stand-point the jural institutions would apparently be arranged thus:

1. Against all; the real rights and the right of inheritance.

2. Against individuals determined; the family-relations and obligations.

From this arises an apparent relationship of the family to obligations by which several have allowed

(a) The idea of the object of law is thus rightly determined by Puchta, Rhein. Museum B. 3. S. 298.

themselves to be deceived. The unreality of that relationship consists in that, which happens between the two individuals in the two cases, being something of a wholly different sort; for in obligations it is a partial subjecting of the one to the will of the other; in the family it is a natural-moral, at the same time legal, relation of life which is to be continuously brought forth by the connexion of the two, and on this account such a subjecting is not at all the import (contents) of the jural relation, which is rather composed of the claim, general and directed against all, to the recognition of the existence of this family-bond (S. 54). It is therefore not true homogeneousness but a purely external and accidental relationship by which in this case people allow themselves to be deluded.(b)

The separate legal institutions have been hitherto enumerated in the following order in which those only ought at present to be left out which are no longer of consequence to the modern Roman law:

Marriage,
Paternal power,
Relationship,
Guardianship,
} Pure family-law *(jus)*.
Things-law or property and *jura in re*,
Obligations,
Applied family-law,
Law of succession (inheritance).

The question however arises whether it is possible and convenient to expound them also in this order, that is whether the natural order, in which the concepts of

(b) Only through misunderstanding could this be taken to imply, that to the family a weaker bond between individuals is ascribed than to obligations. Quite the reverse—the family affects the whole man in

these institutions present themselves to our view, is likewise to be regarded as the convenient order for instruction. The following objection to that course appears especially important. It is indeed in itself possible to separate the applied family-law from the pure, and to treat it as a special segment of the whole potentiality's-law; but the life-like exhibition of the family-relations must necessarily be a gainer, when the influences of the family upon the potentiality are brought into immediate connexion with the family in itself. Now if this is to be done, it is positively necessary to place the whole family-law after the potentiality's-law, since the influence of the family upon the potentiality cannot be understood, unless a connected exposition of the things'-law and obligations has gone before. The law of inheritance lastly must remain wholly incomprehensible unless a previous accurate exposition of the family had laid the foundation for it. From these considerations there results the following arrangement of the institutions of law, upon which, as the simplest and most convenient, I will base my exposition.

Things'-law,
Obligations,
Family-law (pure and applied),
Succession-law (law of inheritance).

According to this statement of the contents of our system of law, it might be expected that the exposition

his innermost nature; the obligation merely goes to something external to the obligor, to an act conceivable as separated from him. The bond is thus in the family certainly no weaker, though a different one: the domination and bondage, in which the essence of the obligation consists, are much too material for the province in which the family has its true nature.

of things'-law would immediately begin. On the other hand we find ourselves at present in the midst of a general part of not inconsiderable extent. Such a part has already been admitted by other jurists and has not seldom been required to serve the purpose of providing for institutions of law for which no suitable place seemed discoverable in the system itself; this treatment of the general part as a mere help in need has again been frequently blamed by others. It is however to be asked whether, for such a procedure, there cannot be discovered a ground of inherent necessity, from which then the right limits of that general part will immediately result.

When we attempt to exhibit the separate institutions of law in the living coherence of their parts, therefore with completeness, we thereby of necessity meet with many sides of their nature which likewise appear in every other institution, although perhaps with certain modifications. To these belongs as a main division, the nature of the subjects of law and in particular their legal (jural) capacity; further the arising and passing away of the jural relations; lastly the protection of rights against injury and the modifications of the rights themselves resulting from that protection. There exists in fact no institution of law in which the clearing up of these questions would not be necessary and important. We might now, as to each institution, deal with such parts again completely and anew, but a repetition of this sort would be tolerable neither to the writer nor the reader. We might treat them as a whole and thoroughly with respect to the institution first presenting itself, consequently according to our arrangement with reference to property, and in the succeeding institutions refer to that: but this procedure

also would immediately show itself as arbitrary and disproportionate. To this is to be added the important consideration that the real generality in such parts of the institutions of law can at once be more thoroughly recognized through their being put together. It thus appears desirable in every point of view to extract this actually general part and put it in the front of the system of the special institutions of law, in order that, in each special institution, we may be able to attach the modifications, which are true of it, to that common foundation.

Indeed the construction of such a general part may be prejudicial to a correct insight, through the ease, with which in this way, that is represented as general which can in fact only be applied in reference to a concrete. Thus *e. g.* if the theory of interest or of correal debts, which can both prevail as to obligations only, is admitted into the general part. The improper general treatment of numerous special ideas or principles of law will present itself still more frequently than such an incorrect placing of a whole institution of law and that, in the proportion that it is less evident, will lead more easily to erroneous views. In this matter therefore great care must be used, in order that the special may not, through its false position, get a deceitful appearance of generality, by which the right limits, between the really general and the special, would be overstepped. Besides as to our science, one of the most fruitful sources of false views is to be found in a baseless striving after abstractions; this striving may be assisted, in a very special manner, by the arbitrary and uncritical establishment of a general part. As however this danger ought not to be misunderstood and the warning, against an inordinate extension of the general

part, to be neglected, so on the other hand, truth may be endangered through an idea or principle of law not being conceived in the generality actually belonging to it. And so here as everywhere, the tact, which knows how to mete the right measure, is the only security against opposite errors.

Less doubt and dispute would perhaps always have arisen on this point if the peculiarity of the various ends and forms of the communication had been kept in view. In a course upon the Institutes it is certainly desirable to enter upon the special as quickly as possible, so that the hearer may above all be put in possession of concrete views of the institutions of law. In the courses upon the Pandects, something more general admits of being imparted without the risk of its proving shapeless and insensible to the hearer. The writer however may go still further, since he may certainly reckon upon a considerable proportion of readers who, in the communication, will find merely a new arrangement and working up, or however a critical examination and rectification, of the concrete acquirements already existing in them.

SECTION LIX.

DIVERSE OPINIONS UPON CLASSIFICATION.

It is not my intention to go through, one by one, the manifold forms in which others have conceived the innate connexion of the institutions of law and in accordance with which they have arranged their exposition of them. Much, which may be of service for a review of them, is already embraced in the exposition of my own plan. A misunderstanding of a general nature must nevertheless be mentioned here. If a

complete insight into the jural relations, as they exert their power in practical life, is to arise in us, it is not enough to know their contents and consequently the operation, which is to be ascribed to them, in the present time but their own mode of life, consequently beside the stable side of their nature, the moveable side of it. To this belong, their arising and dissolution, their developement and their possible transition into new shapes (metamorphoses), especially also the pursuit of them when they are injured. These individual periods in the organic life of the jural relations have sometimes been conceived as proper new rights, been placed in one line with the original jural relations, and a search made for the place to be assigned to them in the system of rights as a whole.(a) Such a proceeding could only lead to the confusing of the concepts.

Although now the examination of the particular attempts at a systematic arrangement of the jural relations is here generally disclaimed, this must undergo an exception with respect to that arrangement which we find in the Institutes of Justinian; for this has been followed, at least in intention and name, by so many teachers and writers for centuries, that it carries with it the historical weight of a great authority and that it is necessary to justify, at least to explain, the difference of the arrangement preferred by me.(b) That,

(a) This has been said, of the right of men to declare their own will, of concluding a marriage or an obligatory contract, of acquiring property, of bringing an action, of demanding restitution and so on.

(b) Hugo has treated this matter with especial predilection and thoroughness in the following writings: Civ. Magazin. B. 4. Num. 1 and 9. (1812.) B. 5. Num. XV. (1825.) B. 6. Num. XV. (1832.) Encyclopädie 8. Ausg. S. (60—65.) (1835.) Besides him among modern writers Düroi Archiv. für civilist. Praxis B. 6. S. 432—440. is especially remarkable.

which up to very modern times we knew as the arrangement of Justinian, we now know more accurately as that of Gaius, to which Justinian has thoroughly adhered so far as a change was not manifestly of necessity brought on by the changes which had occurred in the law itself. This arrangement of Gaius we have now to examine according to two points of view; according to its origin and diffusion and according to its internal worth.

So far as the first point of view, the historical is concerned, people have not seldom admitted or tacitly assumed the division into *persona, res, actio* as the three object matters of the rules of law,(c) to be a primeval and universal one among the Romans inasmuch as it has been practically followed in all or most of the systems of the Roman jurists.(d) In fact in the Roman law such typical contrasts do present themselves of which the ancient and firmly established existence becomes undoubted from the everywhere recurring, constantly uniform phraseology. Among these are, the *vi, clam, precario,* the three sorts of dependence according to *potestas, manus, mancipium,* the three *capitis deminutiones,* the three orders of *cives, latini, peregrini.* That such views had a deep root in the views of law themselves and that they

(c) This division is to be so understood for Gaius I. S. 8. says: "Omne *jus quo utimur* vel ad personas pertinet, vel ad res, vel ad actiones" exactly as he had said S. 1.: "Populus itaque Romanus partim suo proprio, partim communi omnium hominum *jure utitur.*" Persona, res, actio are therefore to him object-matters of the rules of law not of rights or, to use a known phraseology, it is to him a division of the objective law not of the subjective.

(d) Hugo earlier asserted such a generality as to the works of the Roman jurists bearing the name of Institutes. Later he explained it as doubtful. Civ. Magazin. B. 5. S. 403. 404. B. 6. S. 286. 287. 337.

again operated upon the treatment of the theory, is not to be doubted. To be sure if a like ancient and diffused existence is conceivable also of the division according to *persona, res, actio,* then were its importance, in connexion with the contents of the Roman law, not to be doubted: the only question is whether this is conceivable and true. For this assumption however we have not the smallest historical ground, indeed its truth appears very unlikely from the circumstances, that the self-same Gaius wrote a cognate work, (the *res quotidianae*) according to another plan, and that the institutes of Florentinus, in which from the similarity of title one might expect the same arrangement with the Institutes of Gaius, nevertheless follow another.(e) We have therefore no ground for ascribing to that division any universal diffusion whatever, it is rather equally possible that it rested merely upon an individual, casual view of Gaius, who at that particular time thought fit to make such an arrangement, and thus completely vanishes the historical importance which some have attempted to place upon it.(f)

It still remains to test that division according to the second point of view that is according to its innate

(e) Göschen in the Zeitschrift für geschichtliche Rechtswissenschaft. B. 1. S. 74—76.

(f) Hugo civil Magaz. B. 5. S. 417. B. 6. S. 284. has struck out yet another way of making good for that division a safe historical ground. It is said namely not at all to have arisen in legal science but to rest upon a common view of life which the old jurists merely appropriated in accordance with what they had found in some writer not a jurist. If this opinion were more than a bare hypothesis, it would be rather evidence against, than in favour of, the general use among the Roman jurists; for the use of a form, of an origin so accidental and foreign to the law, is perhaps conceivable as the fancy of a single writer but it is not credible that this fancy should have been able to come into universal recognition.

worth. To that end however an accurate settlement is above all necessary of its true meaning on which the modern writers, to a greater extent than one would believe, have very different opinions.

In the first place what are the contents of the first part, *de personis*. Many have at all times conceived this division as if it embraced the doctrine of *status*, *i. e.*, as they understood this expression, of the most important conditions or attributes of persons as subjects of law, therefore the theory of the subjects of law generally. They now further distinguished natural and civil conditions and under the former reckoned age, health &c., under the latter, as main divisions, the conditions of legal capacity, freedom, citizenship, independence which were as well particularly denoted as *status principales*. Now that *status* in this sense is in great part not existent in the Institutes of Gaius and Justinian eye-sight proves, hence they must comfort themselves with the presumption that, in this matter, they have improved Justinian's incomplete exposition; whereby however the entire assumption of this point of view for that first book becomes very doubtful. More consistency and a concept more sharply defined are found in Hugo's assertion that the first part is nothing else than the theory of the LEGAL CAPACITY, or of the three attributes which answer to the three-fold CAPITIS DEMINUTIO.(*g*) The actual contents of the first

(*g*) Civil Magazin. B. 4. S. 20. 21. 235—237. Others seek to mediate by saying that the law of persons is the theory of status *and* of the family-relations. They admit therefore two-fold contents united by no common idea, an assertion very questionable on its mere statement. Thus Mühlenbruch I. S. 78. Düroi Archiv. B. 6. S. 437. says that *status* or *conditio* denotes certain important distinctions without common innate characteristics; small credit is given to the Roman jurists

book of Gaius and Justinian however contradict this opinion; for the theory of guardianship contained in the third *divisio* has nothing whatever to do with legal (jural) capacity since it refers neither to a defect in that capacity nor to a compensation for that defect.(*h*) On the other hand one of the three main divisions of legal capacity is wanting, the distinction of *Cives, latini, peregrini.*(*i*) Since now the first book of the Institutes thus embraces essentially more and essentially less than, according to the opinion of Hugo, it must contain, this opinion itself seems to me thereby completely refuted. If we regard more closely however what is in fact found in the first book of the Institutes, it is almost precisely the same that I have above pointed out as family-law.

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by the assumption of so inconsiderate an arbitrariness. He besides asserts that there belongs to this place the distinction between *cives, latini, peregrini*, which as such does not appear in the first book of Gaius and of the Institutes at all.

(*h*) Guardianship is merely a compensation for the defective capacity for action. That, Hugo himself admits Rechtsgeschichte S. 120. of the 11. Ausg.

(*i*) People have ordinarily deceived themselves on this important point by the circumstance that Gaius sometimes, when induced by other institutions of law mentions this division of persons: *e. g.* as to the *connubium* (1. S. 56.), the *causae probatio* (1. S. 66. fg.), the military testament (2. S. 110.), and in most detail as to the three classes of freedmen, consequently as to Patronatus wherewith, in each of these three classes, different rights are bound up (1. S. 12. fg). This last may easily be regarded as an intentional exhibition of the division mentioned, but it is in any case only an entirely individual application of that so general division. If they would say that at the time of Gaius this was the most important application, it would be manifestly false for the many millions of free-born *peregrini* in the provinces were then certainly of more consequence than the *dediticii* and there could not fail to be then free-born *Latini* in large numbers since so far as we know the latinitas, which Vespasian gave to the whole of Spain (Plinius hist. nat. III. 4.) only passed away into the universal citizenship granted by Caracalla.

It in fact treats of marriage, paternal power, *manus*, slavery, *patronatus*, (that is of the freedmen according to their different classes), *mancipium*, guardianship.(*k*) On the other hand the *cives*, *latini*, *peregrini*, important as these are with respect to legal capacity, do not appear; for these naturally belong to public law, although an influence, by means of legal capacity, upon the private law, is unmistakeable. Relationship only, which I set forth as a branch of family-law, has no place found for it here; but this difference is indeed too small to be able to render doubtful, the identity in the main of the points of view: it must also be permitted to every rigorist to leave out relationship from the exposition of the Roman family-law; then by this omission the concordance between the contents of the family-law and those of the first book of the Institutes would become complete.(*l*) That Gaius differs in the internal arrangement of those institutions and that he does not mention by name the family-law, for which besides he had no technical expression at his command, no one indeed will regard as a refutation of my assertion. I however find some indications of its truth in the expressions which here present themselves. *Status* and *conditio hominum e. g.* have not the entirely indefinite meaning of a condition or attribute in general, but the expression denotes quite specially the place, which the individual man assumes in the various

(*k*) That Justinian has omitted the obsolete among these institutions of law is certainly no ground of objection; he has added none.

(*l*) When moreover the modern writers, in unquestionable accordance with the example of Gaius and Justinian, assign no place to relationship among the institutions of family, this is quite inconsistent since they notwithstanding ascribe, in the theory of the *capitis deminutio*, a wholly special importance to the agnates-family, a point which will be more fully discussed below.

family-relations, as husband, father, guardian and so forth (S. 54. note (e)). The expression *jus personarum* has, as I believe, exactly the same signification since it is employed interchangeably with those expressions. It therefore does not denote, as *jus publicum* and privatum do, a division of the theory of law, but rather the place of the individual in the jural relations appertaining to the family; or, according to the phraseology of numerous modern writers, it relates not to the objective but to the subjective law (comp. Appendix VI).

However there is still more dispute as to the contents of the second and third divisions, *de rebus* and *de actionibus*.(m) The reason of the doubt lies in the portion upon obligations, as an introduction to actions since these arise from obligations, according to some forming the beginning of the third part, according to others, the end of the second part since obligations, as *res incorporales*, are a subdivision of *res* (n) In favour of the first of these opinions the evidence of Theophilus, who in fact furnishes this connexion, has been made use of.(o) This testimony, as that of a co-operator

(m) The moderns for the most part denote these two divisions as *jus rerum* and *jus actionum* after the analogy of *jus personarum*. Now that those two combinations are not found in the old jurists, might be regarded, as in itself, accidental and indifferent; but it is a decisive circumstance against that phraseology that the analogy mentioned has merely a deluding appearance, inasmuch as the expression *jus personarum* denotes not a division of the system but a special jural relation of persons; there can however be no question of a similar relation between several *res* or several *actiones*.

(n) At least this form of the second opinion is certainly more conformable to the Roman law than the association, after the fashion of the code civil, of obligations with property because they are often the occasion of the acquisition of property.

(o) Hugo civ. Magazin. B. 4. S. 17. B. 5. S. 399. who in general treats

upon Justinian's Institutes, would certainly be very weighty if the division had arisen, for the first time, in these Institutes: since however, as we know, it had already been employed by Gaius and has merely been retained by Justinian, that testimony has little historical weight so long as people will not assume, without the smallest evidence, that Theophilus, in addition to the view of Gaius, had found in an ancient writer authority for ranking obligations in the third part *(de actionibus)*.(p) If the testimony of Theophilus is given up as indecisive and the decision of the question in dispute is attempted upon purely internal grounds, the matter stands thus. The partisans of the first opinion are then necessitated to state the object-matters of the three parts thus: persons, things and acts or demands.(q) Then the proper contents of the third part would be the law of obligations to which the *actiones* would merely have the relation of appendage or supplement: this however suits neither the contents and the compass of the large segment beginning with the *actiones*, nor the original plan of Gaius in which the *actiones* not the *obligationes* are specified as the object-matter of the third part. Hence I regard as more probable the second opinion according to which the second part *(de rebus)* contains precisely that which I have above

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the whole of this question in the passages above referred to (note (b)) with uncommon completeness and has given very valuable literary references.

(p) Hugo civ. Magazin. B. 5. S. 404. B. 6. S. 337. He however admits that Theophilus, so far as concerns the connexion of obligations with the third part, may perhaps have misunderstood and disfigured the old model, and that in the compilation of the Institutes of Justinian, they have been perhaps vacillating upon the matter.

(q) Hugo civil. Magaz. B. 4. S. 49. B. 5. S. 117. Encyclopädie S. 60—61.

denoted as potentiality's-law (things'-law and obligations'-law), the third, the general theory of the pursuit of rights. To these three parts of the system, three books in the work of Gaius might have corresponded: since however the second was nearly of the same compass as the two other parts together, he preferred giving the work four books and assigning two of them to the second part. Besides the dispute here mentioned, as to the true position of obligations is of less consequence, than is commonly assumed, as to the arrangement of the system of law as a whole. It is undisputed that Gaius treats the whole potentiality's-law with unbroken continuity, equally undisputed that the third part embraces the pursuit of rights and much of the law of process. The dispute is then narrowed to the question, whether the second part *(de rebus)* embraces the whole potentiality's-law so that obligations make up its last chapter or whether, as an introductory chapter to the third part *(de actionibus)*, they are placed before it.

If now we examine the innate value of the division so determined, we must find it, as to the main plan, suitable to the object-matter but unsatisfactory in the details of the execution. It gives to several of the most important jural (legal) institutions a far too subordinate position; thus marriage, which is presented merely as a ground of origin of the paternal power as if it had not, on its own account also, the most rightful claim to recognition: so the law (right) of inheritance which literally is mentioned only as a ground of acquisition of property, while it is equally applicable whether property is met with in a potentiality or not. This unnatural arrangement has been in great measure induced by an excessive use, through-

out the work, having been made of the logical form of the *divisiones;* this one-sidedness of treatment has likewise been the occasion of numerous other forced transitions.(r) These formal incompletenesses have however been an obstacle neither to the richness nor the clearness of the work, of which certainly no friend of our science will misunderstand the incomparable value. However there exists no ground for absolutely imitating its arrangement in point of form, even where we recognize it to be incomplete, and we ought not to be blamed for density and arrogance when we strive to set forth the matter of the Roman law, historically handed down to us, but in a way other than it has been done by Gaius. Besides the two main divisions of the system of Gaius are again found as main divisions in our exposition also, so that the difference concerns merely the more accurate membering in particulars.(s)

(r) Thus *e. g.* his first part consists of three divisions of which the third runs thus: all men are either under guardianship or not, wherefore we will now treat of guardianship. In like manner one might thus have introduced the exposition of the contract of sale: all men have either concluded a contract of sale or not, or also all legal transactions are either contracts of sale or not, wherefore we will now deal with contracts of sale. The peculiarity of slaves appearing twice, in the first and the second *divisio*, this proceeding being justified by no difference of legal reference, is explicable in the same way. The first mention is mere show and only serves as a transition to the different classes of freedmen (that is therefore to the relations of patronatus), or in other words: the *divisio* stands there merely as color for the *subdivisio* of the *Ingenui* and *Libertini* at whom alone this passage is directed. It is therefore not correct when many would justify this double mention of slaves by saying that Gaius in the first place is treating of the *potestas*, in the other of the *dominium in servos;* for this is manifestly not the case; in the first mention he does not deal at all with what concerns slaves in themselves.

(s) Hugo himself amid all his admiration of that Roman system, to which he ascribes a greater diffusion than I can find historical ground

However I must still particularly protest against the excessive importance which is often ascribed to questions concerning the form of our expositions of the science. I do not thereby mean that this is a matter of indifference but only that we must not deceive ourselves as to what is properly matter of substance. If a dogmatic exposition of the law is so constituted as, to destroy the internal unity of the institutions of law, to bind up together the essentially diverse, to disfigure and reverse the real relation of different institutions to one another in point of importance, then such errors of form are essential since they obscure the matter itself and are hindrances to the true insight. Where however that case does not present itself, we may put up with an arrangement even when we believe that we perceive many faults in it. According to this principle of a toleration being, within certain limits, admissible it has been explained above that the value of Gaius is in no way lessened by that which we have to find fault in him: and in accordance with the same principle, in our own days, different systems of law may subsist peacefully beside one another, discrepant as their arrangement may at first sight appear. The toleration, which is here claimed, ought not thus to be regarded as indifference to the

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for admitting, still allows that, according to general views of law and in particular for the needs of our modern law, many another arrangement might be more convenient than that of the Institutes and he thereby comes in the main to the point of view taken by me. Civ. Mag. B. 5. S. 397. B. 6. S. 284—287. Speaking generally I hold the difference of opinion, which exists between us in this matter, as much less essential than at first sight appears and I am especially glad to be able to add that the arrangement here adopted first came to my hands through Hugo's Institutions. Berlin 1789 although I have since striven to develope and establish it in my own way.

imperfect in any shape whatever, but as a respectful recognition of the free play-room for the individual perception upon which rests the true life of all science.

There still remains to be mentioned a general view, presenting itself in our law-sources, which might at first sight be likewise regarded as the basis of a classification, which however I merely treat by way of appendix because it has not in fact been applied to the purposes of classification by modern writers. I mean the three *juris praecepta* which Ulpian sets out in the following words: *Juris praecepta sunt haec, honeste vivere, neminem laedere, suum cuique tribuere.*(t) *Honeste vivere* is the preserving of moral worth in one's own person, so far as this worth is externally visible. *Neminem laedere* is the respecting of extraneous personality as such, therefore the practical recognition of the so-called original rights. Lastly, *suum cuique tribuere* is the recognizing of the aggregate of the acquired rights of other men.(u) Now are these, as one might believe according to Ulpian's expression, in fact rules of law? The second and third *praeceptum* appear to be such rules, the first not; in fact however in all of them no rules of law are to be sought but rather moral precepts in which rules of law have their foundation. As to the third this is at once manifest; it is the ethical

(t) L. 10. S. 1. de just et jure (1. 1.), S. 3. J. eod. (1. 1.).

(u) Many have referred the second praeceptum to the person, the third to the potentiality; the true limits are not given here. That one infringe not the marriage or paternal power, although it has no reference to the potentiality, belongs to the third praeceptum, the avoidance of homicide to the second. Burchardi Grundzüge des Rechtsystems S. 42. *fg.* explains the three praecepta in his way; the first as *jus publicum*, the second as *jus privatum*, the third as the mixed law of actions. Comp. above S. 16. 0.

precept of justice which here has like contents and compass with the system of acquired rights.(v) It is also unmistakeable as to the second, that many of the most important rules of law originate in it; but even the first *praeceptum*, with respect to which this connexion appears at the best doubtful, is however the ground of origination of rules of law and can for that reason be called, in the sense of Ulpian a *juris praeceptum*. From it springs every institution of law against injury of the *boni mores*, against the turpe.(w) To it moreover likewise belongs the important, so much embracing, sum of rules of law which have for their foundation the furthering of truth and honesty, consequently the very manifold influence of the DOLUS upon all parts of the private law. One may say of these rules of law that they belong equally to the first and second *praeceptum*, because in each of them, independently of the other *praeceptum*, they find their justification. The three *praecepta* are therefore no rules of law but they are the basis of a classification of those rules according to their grounds of origin; only certainly no one will think of treating the system of rights according to this arrangement. If it is sought to determine the rank of the three *praecepta* according to their innate nature, the first stands highest because it is the most intrinsic (inner) and on that very account bears in itself the germ of the others; the second has

(v) Thence it becomes clear why the *justitia* exclusively is ordinarily explained as *voluntas jus suum cuique tribuendi* without mention of the first two *praecepta*. L. 10 pr. de J. et J. (1. 1.), L. 31. S. 1. depos. (16. 3.), Cicero de invent. II. 53., de finibus V. 23., Auct. ad Herenn. III. 2.

(w) To it belongs the invalidity of contracts which, mediately or immediately, promote anything immoral: as the *condictio ob turpem causam* gives an example.

a more external character, the third one still more so. On this account these two may, independently of the moral inclination of the justly acting man, be completely observed. If one on the other hand looks at the importance and fruitfulness of the three *praecepta* for the law, the relation is exactly reversed. The third is the most productive source of legal rules, the second and first are by degrees less so; very naturally since the law, by its nature belongs to the province of the external collective life.(x)

(x) Essentially the same view as to the three praecepta is to be found in Weber naturliche Verbindlichkeit S. 98., only he does not carry it through the single praecepta.

APPENDIXES.

I. II.

APPENDIX I.

JUS NATURALE, GENTIUM, CIVILE

(To S. 22. Note (s)).

Among the Roman jurists are found two divisions of the law in reference to its general origin. The one is two-membered: law which prevails merely among the Romans *(civile)*, or among all nations as well *(gentium* or *naturale)*. The other is three-membered: law which prevails merely among the Romans, or among all peoples *(gentium)*, or among men and beasts alike *(naturale)*.

The first of these divisions I not only hold to be the only right one, but I also maintain that it is to be regarded as the view prevailing among the Romans themselves, while the other can be merely considered as an attempt, at a wider developement, which has obtained neither general recognition nor influence upon the special doctrines of law.

The two-membered division is found most completely adopted in numerous passages of Gaius. At the commencement of his work he sets it out expressly without a trace of a possible third member.(a) The *jus gentium* is to him the older, as old as the human race itself.(b) It springs from the *naturalis ratio* in-dwelling in all men.(c) Thence he also calls it otherwise *jus naturale* as he then, with arbitrary

(a) Gaius I. S. 1. (L. 9. de J. et J. 1. 1.)

(b) L. 1. pr. de adq. rer. dom. (41. 1.)

(c) Gaius I. S. 1. 189. L. 1. pr. de adq. rer. dom. (41. 1.)

interchanging, sometimes refers the natural acquisitions of property to the *jus naturale*,(d) sometimes to the *naturalis ratio*.(e) He bases the principle, that the house also belongs to the owner of the soil, upon *jus civile* and *naturale* alike.(f) The agnations and cognations he calls *civilia* and *naturalia jura*.(g) Manifestly therefore he admits only two species, and *jus naturale* is to him completely synonymous with *jus gentium*.

In the same way Modestinus knows only two kinds of law, *civile* and *naturale*.(h) The same is found in Paulus who also ascribes to the *naturale jus* the operation of the *servilis cognatio* as a hindrance to marriage.(i) *Naturale jus* is used in like manner by MARCIAN, FLORENTINUS, and LICINIUS RUFUS, in cases in which it undoubtedly means the *jus gentium*, is indeed actually interchanged with this expression.(k)

Ulpian has the three-membered division most completely;(l) next to him Tryphonin(m) and Hermogenian.(n)

(d) Gaius II. S. 65. 73.

(e) Gaius II. S. 66. 69. 79.

(f) L. 2. de superfic. (43. 18.)

(g) Gaius I. S. 158.

(h) L. 4. S. 2. de grad. (38. 10.)

(i) L. 11. de J. et J. (1. 1.) L. 14. S. 2. de ritu nupt. (23. 2.)

(k) L. 2. 3. 4. de div. rer. (1. 8.) L. 59. de obl. et act. (44. 7.) L. 32. de R. J. (50. 17.) Cicero also everywhere puts merely *natura* and *lex* in opposition to one another and uses *natura* and *jus gentium* as synonymous. Cicero de off. III. 15.

(l) L. 1. S. 2. 3. 4. L. 4. L. 6. pr. de J. et J. (1. 1.)

(m) L. 64. de cond. indeb. (12. 6.), upon the origin of slavery entirely in accord with Ulpian. L. 31. pr. depos. (16. 3.) is less determinate "Si tantum naturale et gentium jus intuemur" where the naturale *et* gentium may be understood naturale *id est* gentium, where in fact a distinction between the two sorts of law would not be conformable to the meaning.

(n) L. 5. de J. et J. (1. 1.) The text here cited names the *jus gentium* only but with such evident reference to the *jus naturale* close

It rests upon the following view. There existed a time in which men recognized among themselves merely those relations which are common to them with beasts: that of the sexes and that of propagation and education (bringing up). To that succeeded a second age which established states, introduced slavery, private property, obligations. Finally the law, in each separate state, developed itself in a peculiar manner, partly by discrepant determination of those general institutions, partly by institutions newly added.

The first thing, which astonishes in this text, and by reason of which it has often been severely blamed, is the law and consciousness of law ascribed to beasts.(o) When however the certainly ill-chosen expression is abandoned, the view itself admits of easy defence against that censure. Each jural relation has for its foundation matter of some kind, to which the form of law is applied and which therefore can also be conceived abstracted from this form. This material is, in most of the jural relations, so far of an arbitrary kind that a continuous existence of the human race can also be conceived without it; thus in property and obligations. Not so with the two relations above named, which are rather universal natural relations common to men and beasts and without which the human race could have no enduring existence. In fact therefore it is not the law (right) but the material of the law (right), the

at hand (what he had no doubt named immediately before), that we may without hesitation assume a complete agreement with Ulpian. I have also drawn the exposition of the whole view given in the text from this passage.

(o) L. 1. S. 3. de J. et J. (1. 1.) "jus istud ... omnium animalium ... commune est." And lower down: "videmus etenim cetera quoque animalia, feras etiam, istius juris peritia censeri."

natural relation lying at its base, which is ascribed to beasts.(p) This view now is not merely true but also important and worthy of notice; only it is not adapted to a division of law viz. to the practical need of the Romans. Without doubt it was occasioned by the perception that the institutions of law, even when they were found in all other nations, must nevertheless be regarded as natural in different degrees. Thus *e. g.* they could not misunderstand that the origination of slavery is to be primarily traced back to violence and so to accident and arbitrariness: it is possible indeed that the nature of this relation has given the impulse to the entire view; but the whole division based upon this consideration is to be rejected. First, because the distinction of more or less natural is an arbitrary and shifting one, secondly, because the division, so conceived, related merely to the general, indeterminate, existence of the institutions of law and must on that account remain unfruitful; the far more important carrying it out into the individual rules of law lay wholly without its province. Not so as to the two-membered division, in which the contrast of the rules of law becomes evident and which, on that account, is alone useful for application to the system of law.

It remains also to point out that the two-membered division constantly asserted the mastery in the Roman law. In proof of this the majority of testimonies already quoted on that point might be made available. However I attach the less weight to them on the point,

(p) The defence of Ulpian in Donellus is not essentially different: Ulpian did not ascribe the actual jural relation to beasts but merely something similar to it. However the division as such is not justified by that.

that the selection of texts, which we possess upon the subject may have been made very accidentally. On the other hand I regard as quite decisive the great influence of this division, which can be pointed out through the whole system of law, while the three-membered one, on the contrary, appears in no single application. For example we find throughout, in the legal institutes and in single propositions of law, a contrast made up of two, not of three, members; the second member refers constantly to the *jus gentium* and, what leaves the matter beyond doubt, is nevertheless regularly denoted by the expression *naturalis*. One might, it is true, regard this also merely as a multiplication of the testimonies in favour of a two-membered division so that in them, merely the continuous strife of opinions, not the real victory of the one opinion, would appear. Ulpian himself however has in many texts this conception and terminology and it is therefore clear that he also set forth the two-membered division merely as a harmless speculation in the general, but that, in all important applications throughout the whole system of law, he never attempted to make use of it. This two-membered division, denoted by *civile* and *naturale*, occurs by name in the following applications:

1. The conditions of the marriage rest upon *civilis* or *naturalis ratio*.(q)

2. There exists, also according to Ulpian a double relationship, *civilis* and *naturalis cognatio*.(r)

3. Property and obligations may be acquired sometimes *civiliter*, sometimes *naturaliter* and accord-

(q) Pr. J. de nupt. (1. 10.)

(r) L. 4. S. 2. de grad. (38. 10.) (Modestin), S. 1. J. de leg. agn. tut. (1. 15.) L. 17. S. 1. de adopt. (1. 7.) (Ulpian.)

ing to this the permissibility of free representation is accommodated.(s)

4. Ulpian calls the right of the owner of the land to the house *naturale jus.*(t)

5. The *possessio* is either *civilis* or *naturalis* likewise according to Ulpian.(u)

6. Especially important is the contrast of *civilis* and *naturalis obligatio* which Ulpian recognizes by this terminology.(v) The meaning of the *naturalis obligatio* as one established by the *jus gentium* is not only clear in itself but is expressly testified to by several texts.(w)

The conduct of the Institutes of Justinian in this matter is wholly thoughtless. The compilers first admit the texts of Ulpian upon the three-membered division, and they apply it to the case of slavery.(x) Then they admit also the texts of Gaius, Marcian and Florentinus in which the two-membered division is sometimes stated, sometimes quite definitely assumed.(y) Especially worthy of remark however is a text in which they admit the words of Gaius but with an

(s) L. 53. de adq. rer. dom. (41. 1.) (Modestin.)

(t) L. 50. ad L. Aquil. (9. 2.)

(u) L. 3. S. 15. ad exhib. (10. 4.) L. 1. S. 9. 10. de vi (43. 16.), both from Ulpian.

(v) L. 6. S. 2. L. 8. S. 3. de fidej. (46. 1.) L. 14. de obl. et act. (44. 7.) L. 6. de compens. (16. 2.) L. 10. de V. S. (50. 16.) L. 1. S. 7. de pec. const. (13. 5.), all from Ulpian.

(w) L. 84. S. 1. de R. J. (50. 17.) (Paulus). L. 47. de cond. indeb. (12. 6.) (Celsus).

(x) S. 4. J. de J. et J. (1. 1.) pr. J. de j. nat. (1. 2.) pr. J. de Lib. (1. 5.)

(y) S. 1. 11. J. de j. nat. (1. 2.) pr. S. 1. 18. J. de div. rer. (2. 1.)

addition which says expressly, *jus naturale* means the same as *jus gentium* and it has already been so stated.(z)

According to this explanation it is most advisable, to let the mode of exposition of Ulpian rest as a curiosity and, on the other hand, to treat that of Gaius as the one prevailing in Roman law.

(z) S. 11. J. de div. rer. (2. 1.) "quarundam enim rerum dominium nanciscimur jure naturali, quod, sicut diximus, appellatur jus gentium; quarundam jure civili."

APPENDIX II.

L. 2. C. QUAE SIT LONGA CONSUETUDO (8. 53.)

(To S. 25. Note *(y)*)

This rescript of Constantine of A. D. 319. runs thus Consuetudinis ususque longaevi non vilis auctoritas est: verum non usque adeo sui valitura momento ut aut rationem vincat aut legem.

The amount of difficulty always created by this text and the number of attempts made to remove that difficulty, are incredible. The meaning, which appears at first derivable from it, is, that customs are merely to avail for the completion of the written laws but not for their modification or abolition. Plainly however this sense is, according to numerous testimonies from all times, so objectionable (S. 25.) that we must necessarily look for another.

Now in the first place we may unhesitatingly assume that particular customs only are here spoken of, and that it never was the intention of the Emperor to weaken such customs as that *e. g.*, by which the second chapter of the L. Aquilia was rendered obsolete.(a) This follows, in the first place, from the circumstance that provision must certainly be made here for such customary laws only as should arise newly, or at least come to light, in future. In the time of Constantine that was hardly to be expected of any but particular customs. In the second place, the somewhat depreciatory expression *non vilis auctoritas* would have been wholly unsuited to a general national custom, it might well be used of the customary law of particular

(a) L. 27. S. 4. ad L. Aquil. (9. 2.)

localities. Further by the *lex*, which is here mentioned, decidedly no other than a statute of the Emperor is, in this time, to be understood; and thus therefore the general question arises here: what relation does a particular customary law bear to a general law of the Emperor? This law again may itself have either an absolute or mediatory nature (S. 16). If it is of an absolute nature, through the general relation of the state, a very natural limitation of the particular customary law arises (S. 9). Even in the absence of a law such a customary law is impossible if a general interest of the state is hurt thereby.(*b*) This proposition therefore will be none the less valid when that same interest of the state has given rise to an absolute law. In opposition to such law, the later custom of a city or district cannot thrive. Just as little however can their earlier customary law which, as a particular law not expressly abolished by the general law, an attempt might otherwise have been perhaps made to preserve. Thus *e. g.* neither earlier nor later customs can be valid in opposition to general written usury laws.(*c*) An entirely similar relation is presented as to written laws for particular places. Thus *e. g.* by such laws it was permitted, in many towns, to bury within the walls; when now at a later period this sort of burying was generally forbidden on political grounds, those laws were, even without being specially mentioned, never-

(*b*) L. 1. C. Th. de longa consu. (5. 12.): "*cum nihil per causam publicam intervenit*, quae diu servata sunt permanebunt." In like manner in a particular case but with greater definiteness. Nov. 134. C. 1.

(*c*) L. 26. S. 1. C. eod. (4. 32.) L. 1. pr. de usuris. (22. 1.) does not speak at all of customary law but of the customary rate of interest, which perhaps might overstep the legal measure; whether the custom, in this case, and under what conditions, changes the law, this text at least says nothing. Comp. Puchta II. S. 77.

theless abrogated.(d). The relation is otherwise in respect to mediate laws. Thus Azo appeals to the customs of Modena and Ravenna by which the *emphyteuses* granted by the Church were not put an end to by failure, during two years to pay the quit-rent: these customs are valid since in truth that anomaly on this matter might have been determined by contracts.(e) However it is this contrast alone which determines the power of the particular customary law in its relation to a general law of the land: not the contrast of the public and private law. Then there exist even in the public law, rules which ought to be generally observed but may, without danger, admit of exceptions in individual cases: in such cases a particular customary law is also admissible. Thus *e. g.* it was the rule that municipal magistrates had no *legis actio*, notably in the case of emancipations, to particular magistrates they were exceptionally given; in this case however Justinian unhesitatingly admits an establishment of this privilege by custom.(f) On the other hand in Bithynia the Lex Pompeja had ordained that into the city-senates only citizens of the particular city, not citizens of other cities of Bithynia, should be admitted; this precept had frequently been disregarded and the question arose whether that law is abrogated by the custom of particular cities. Trajan indeed, from indulgence, allowed the already existing foreign senators to be well appointed, but he explained with respect to the future that the law, without regard to the custom, must be observed; no doubt because the law had a political aim.(g)

(d) L. 3. S. 5. de sepulchro viol. (47. 12.)

(e) Azo Comm. in Cod, in L. 2. cit.

(f) L. 4. de adopt. (1. 7.) L. 6. C. de emanc. (8. 49.)

(g) Plinius epist. X. 115. 116.

Up to this point the part of the text, which says "*consuetudo non vincit legem,*" has been explained. Now it says still further however "*consuetudo non vincit rationem,*" and the question is; which of its numerous significations does the word *ratio* bear in this particular place. In other texts as to customary law *ratio* is equivalent to the common conviction of the truth and necessity of a rule, consequently to the proper ground of origin of this law to which the custom itself is merely related as consequence and badge.(*h*) It cannot mean that here, for how could there be a question as to a conflict of the conviction with the custom in which the latter must yield? in other texts however beside a *ratio juris* a *ratio utilitatis* also occurs,(*i*) and as under the *lex* a law of the land, occasioned by the interest of the state, is to be understood, so the *ratio* plainly denotes the interest of the state not protected by a written law, the *ratio publicae utilitatis.* By means of this explanation, the expression receives a more definite and more practical meaning than if one would understand by it, the reasonableness of the custom generally.

The entire import of the passage would be consequently this: local customs ought not to be valid when they stand in contradiction with the interest of the state, be this recognized by a general law earlier or later or not; and by this precept something certainly not unimportant is determined as to local customs, but something which is grounded upon their natural

(*h*) L. 39. de leg. (1. 3.) L. 1. C. quae sit l. c. (8. 53.) See Syst. S. 25, note *(d)*.

(*i*) L. 1. C. de adquir. et retin. poss. (7. 32.) "... tam ratione *utilitatis* quam *juris* pridem receptum est." Savigny Besitz S. 363. of the 6th Ausg.

connection with the bond of the state, not perhaps an arbitrary positive limitation of their operation. The positive, which one might perhaps seek for in it, would be the wholly general expression *lex*, which one might so understand, that the precept should hold good of all written laws not merely of the absolute ones; but in accordance with the connexion in which the expression stands with *ratio*, still more however in consequence of the connexion in which this text is found with the rest of the expressions of the Justinianean law-books, I hold it more correct to refer the expression merely to absolute laws, to which class besides the majority of the imperial laws belong, and especially to the very encroaching laws of Constantine.

The essentials of this explanation, namely the relation of the local customary law to general laws, already exist in Johannes and Azo although hesitatingly and mingled with erroneous matter: more definitely and clearly in Donellus.(*k*) Placentin already leads to the false, at a later time often trodden, way of distinguishing between republics and monarchies: in the former customary law is to be valid against a written law, in the latter, not.(*l*) The moderns have often struck into very arbitrary ways by endeavouring to limit the precept to some particular application of customs or other; by this means the contradiction to other texts is, at the best diminished in point of quantity, not removed.(*m*) Some throw the whole stress upon

(*k*) Azo comm. in Cod in h. l. Accursius ibid. Donellus Lib. I. C. 10.

(*l*) Placentius in summa Cod, tit quae sit longa consu.

(*m*) Thus *e. g.*, Schweitzer de desuetudine Lips 1801. 8. p. 47—57. Hübner Berichtigungen und zusätze zu Hopfner S. 167. Schweitzer quite arbitrarily narrows the text to the bare *desuetudo* in contradistinction to the constantly permissible *abrogatio* by custom: the *desue-*

the *sui momento:* the custom in itself is no better than a written law therefore everything depends upon the simple question, which of the two is the newer. Then the practical meaning would be simply that every custom is beyond all doubt abolished by a later written law and is not protected by a higher nature of its own. Constantine certainly never meant to express anything so superfluous.(n) Lastly Hofacker propounds an explanation according to which the *consuetudo* here denotes, not a customary law but merely a custom in point of fact, as *e. g.* frequent thefts; these are not to abrogate a written law.(o) For such a meaning however the expression employed, *non vilis auctoritas,* would be much too good since a custom in this acceptation cannot have even the smallest authority.

Lastly the manner, in which the canon law has handled these difficulties, is very note-worthy. Our

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tudo was valid in the republic (L. 32. de leg. turns on that), in the monarchy not (L. 2. C. quae sit l. c.) Hübner sees in the text only an erroneous *usual* interpretation; but by this the law would in no way be overcome, but merely the different opinion of him who holds this interpretation to be erroneous.

(n) Hilliger ad Donellum l. 10. and more in detail Averanius Interpret. Lib. 2. C. 1.

(o) Hofacker l. S. 122: .. "consuetudinem h. l. accipi pro *consuetudine agendi civium* quae ... legi prohibitivae obstet." Puchta I. 120. II. 58. 211—215. hits upon another way by understanding the *consuetudo* here mentioned of the use in point of fact which is not to avail as means of knowledge of the common conviction, therefore of customary law where the existence is jurally or legally impossible. Now however arises the larger question, by what means are we to know that numerous cases of use are inapt to establish the existence of a people's-law? By the answer which he gives to this (II. S. 214.) his explanation in the result agrees with that here given. According to both opinions there is a want of the conditions under which the custom in point of fact can become a genuine customary law and consequently obtain efficacy.

text is inserted word for word in the *Decretum*;(p) but the difficulties in the explanation of it did not remain unknown to the canonists themselves and Gregory IX sought to resolve them, in his own Decretals, by the following paraphrase.(q) "The *naturale jus*, that is to say the law implanted by God in men, can be changed by no custom: the positive law also (the public law) can it not change except when the custom is consistent with reason and confirmed by an adequate duration." This determination, discrepant from the Roman law and in itself also questionable, evidently proceeded from a desire of composing, by a sort of middle cut, the strife which had been occasioned among the jurists by our text. Here the relation of the new custom to the older law was treated: similarly the following prescription treats of the converse relation.(r) When the Pope enacts a general law, earlier local customs or statutes are not to be abrogated by it, always provided that the customs be found reasonable and that their abolition is not specially expressed in that written law.

Equally note-worthy is the formal *parody* of our text which is found in the feodal law of the Lombards. It

(p) c. 4. D. XI.

(q) C. 11. X. de consuet. (1. 4.) .. "Licet etiam longaevae consuetudinis non sit vilis auctoritas: non tamen est usque adeo valitura, ut vel juri positivo debeat praejudicium generare, *nisi fuerit rationabilis* et legitime sit praescripta." The end is properly merely a repetition or more definite inculcation of the *longaevae* which stands at the beginning, and this would probably have been omitted if they had not thought it advisable to adhere, as much as possible, to the words of the text of the Code.

(r) C. 1. de constitut. in VI. (1. 2.): ".. ipsis, *dum tamen* sint rationabilia, per constitutionem a se noviter editam, nisi expresse caveatur in psa, non intelligitur in aliquo derogare."

may often have happened that a Romanist cited some text or other of the *Corpus Juris* by itself, which was in contradiction with the feodal customs, and then sought to invalidate the custom by referring to the L. 2. C. quae sit l. c. Now Obertus condemns this procedure generally by means of the following proposition which is a parody on our text: "Legum autem Romanarum non est vilis auctoritas, sed non adeo vim suam extendunt, ut usum vincant aut mores.(s)

(s) 2. Feud. 1.

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